Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

EMILY ABEL WAGNER, Petitioner

vs.

THE BOARD OF SUPERVISORS OF
LOUISIANA STATE UNIVERSITY
AGRICULTURAL AND MECHANICAL COLLEGE,
ROBERT MATHEWS, IRVING LANE, Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

Petitioner:

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QUESTIONS PRESENTED

1. Under Louisiana law, the 14th Amendment, and the terms in the Graduate Catalog, did petitioner have a property interest and a substantive right to review by the dean?

2. Did LSU afford Petitioner the minimum requirements for due process before she was dimissed?

3. Whether LSU's seven year limit for the Ph.D. program is unconstitutional as written because it is vague?

4. What was LSU's "purpose" in implementing the seven year limit and does the Dean's unfettered classification of students further the accomplishment of that purpose?

5. Whether Universities' changing of students' substantive rights leads to denial of their rights to due process under the Fourteenth Amendment due process clause?

6. Under US 42 §1983, whether Lane is liable for the harm he caused Petitioner when he used an education cognovit to violate Petitioner's due process rights?

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OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is *Wagner v. Board of Supervisors of Louisiana State University*, 2006-C-21 (La. 4/4/06) and is unpublished.

JURISDICTION

The date on which the highest state court, the Supreme Court of Louisiana, decided my case was April 24, 2006. A copy of that decision appears at Appendix A.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

U. S. Constitution
Amendment XIV
Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person n its jurisdiction the equal protection of the laws.

U.S Constitition,
Article 1, Section 10(1).

No state shall enter into any Treaty, Alliance, or Confederation; grant letters or Marque and Reprisal; coin money; emit Bills of credit; make any thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attander, ex post facto Law; or Law impairing the Obligation of Contracts, or grant any title of Nobility.

The Louisiana Constitution,
Article VIII, Preamble

The goal of the public educational system is to provide learning environments and experiences, at all stages of human development, that are humane, **just**, and designed to promote excellence in order that every individual may be afforded an **equal opportunity** to develop to his full potential.

STATUTORY PROVISIONS

La. R.S. art. 2056.

In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text.

La. R. S. 17: 3101 Declaration of Purposes.

The maintenance and preservation of the **normal educational process** at the institution of higher learning of

the state of Louisiana and the ability of each individual student to pursue an education are essential to the welfare of the State of Louisiana. The purposes of this Chapter is to accord such processes and pursuits the fullest protection from interference and disruption.

La. R. S. 17:3102 (2)

Normal educational process includes, but is not necessarily limited to, the privilege and ability of students, faculty, administrators and other personnel to study, teach, administer and perform their duties at the institution of higher learning as well as to do all things necesary and incidental to these pursuits.

La. R. S. 17:3104: Content of notification of dismissal.

The notice of expulsion or dismissal shall specifically set forth the ground or grounds upon which expulsion or dismissal is based, as well as contain a short and clear statement of the facts upon which the expulsion or dismissal is based. In addition, the notice shall inform the recipient that he may, within thirty days after the date of expulsion or dismissal order, request a hearing before the governing authority of the particular institution of higher learning in which he is enrolled and/or employed. The hearing before the governing authority shall be held and its decision rendered not later than thirty days after the date of the request for such hearing by the individual concerned.

42 USC § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

REASONS FOR GRANTING THE PETITION

Universities view The U.S. Supreme Court decisions in the *Horowitz* and *Ewing* cases as license to dismiss graduate and professional students e' en when there is no legitimate academic basis. The present case is an extreme manifestation of this unfettered discretion Universities enjoy to the detriment of graduate students whose rights are not even balanced in the equation. The Court has not made any related decisions since the *Ewing* case in 1985. The Court should revisit the issue to determine whether the Louisiana Courts in this case adhered to the principles therein and if not, the Court should clarify for the benefit of graduate students; the due process protection a student is entitled to.

V. STATEMENT OF THE CASE

Respondents in this case are the Board of Supervisors of Louisiana State University (LSU), Irving Lane (Lane), Department Head for the Department of Psychology during Petitioner's tenure at LSU, and Robert Mathews (Mathews), LSU Professor of Psychology and Chair of Petitioner's Advisory Committee. Petitioner Emily Wagner is seeking a declaration that LSU's policies and procedures that prompted this lawsuit are unconstitutional as written, as construed, and as applied in her case. She is also requesting a declaration that her constitutional rights were violated when LSU manipulated Petitioner's substantive rights and altered its rules to dismiss her. She also seeks an injunction to grant Petitioner equitable relief including reinstatement to complete her Ph.D. requirements and damages under 42 U.S.C. § 1983. Petitioner also seeks an injunction to prohibit LSU from violating the constitutional rights of other similarly situated graduate students.

Petitioner Emily Wagner held a Masters degree in Psychology earned in 1976. She had worked ten years in psychology before she applied to LSU's cognitive psychology program in 1992. With four children from Kindergarten to college age, petitioner knew she would need to work while attending graduate school. In the Spring of 1992, before agreeing to move from Arkansas to Louisiana, Petitioner received from LSU copies of the *Louisiana State University Graduate Catalog 1992-1994* and the publication titled *Graduate Study in Psychology*. Such publications describe the contractual relationship between the graduate student, the University, and the department.[1]

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[1] *See University of Texas v. Babb*, 646 S.W.2d 502 (Tex. App. 1 Dist. 1982). *Fussell v. Louisiana Business College of Monroe*, 478 So. 2d 652

In 1992 when Petitioner began the LSU graduate program in Cognitive Psychology, Mathews became her major professor and Chair of her Committee and was head of the cognitive psychology area, Lane was Head of the Psychology Department, and Janet Mc Donald (Mc Donald) was an Assistant Professor in the Cognitive Psychology area. Petitioner satisfactorily completed the core courses with good grades within the two years allotted as required by the rules of *Graduate Study in Psychology*. In 1995, McDonald became head of the Cognitive area and initiated a series of actions that delayed Petitioner's progress. In spite of the unanticipated 1996 events and a house fire that destroyed her home in 1997, by 1999 Petitioner was on track and making progress toward her degree. Petitioner successfully defended her General Exam in November of 1999.

A. In 1999 Mathews agreed to support Petitioner for the two years he believed she needed to complete her degree.

The seven year time limit and extension are described in the 1992-94 LSU Graduate Catalog as follows:

> The program for the doctoral degree must be completed within seven years from the time a student is classified as a doctoral student (GRAD 7). This time limit may not be exceeded except by special permission of the dean of the Graduate School.

This statement is the only reference graduate students or faculty have to this seven year time limit rule.[2] Note that the

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(La. App. 2d Cir. 1985); *Babcock v. New Orleans Baptist Theological Seminary*, 554 So. 2d 90 (La. App. 4th Cir. 1989).

[2] Though Petitioner vainly requested additional written procedures between Fall of 1999 when she first requested an extension until July of 2002, LSU refused to provide any procedures. After Discovery ended LSU provided "GUIDELINES FOR PETITIONS FOR EXTENSION OF THE 7-YEAR TIME LIMIT FOR THE PhD." (Exhibit Larkin 1). However this procedure does not fetter the graduate dean, is intended for faculty, not for students (Larkin Deposition, Pages 30-31), and both Lane

only person the Graduate Catalog vests with authority to implement the seven year rule is the graduate dean. At the time in question, the Graduate Dean entrusted with granting or denying extensions was Dean John Larkin. Though the graduate catalog includes neither a procedure for invoking the dean's authority nor criteria which would justify an exception, Dean Larkin testified his practice (or usage) had been to yearly grant 40 to 55 extensions.[3] In evidence is a list including 60 L.S.U Ph.D. graduates who each needed and were allowed nine to fourteen years to graduate. Dean Larkin also allowed two similarly situated Cognitive Psychology graduate students, both students of Mathews, each ten years to complete degree requirements.[4] With no standards to determine who is eligible for an extension[5] the graduate dean is free to grant or deny time extensions on the basis of no reason, or any reason.[6]

B. The Graduate Dean's Role

The dean is "an administrative officer in charge of a college, faculty, or division, in a university or a college . . . who supervises the enforcement of rules."[7] Consistent with this definition, the LSU 1992-94 Graduate Catalog assigns to the graduate dean primary supervision over the graduate student and also the faculty in their relations to graduate students.[8] The only role assigned to the LSU Graduate Dean

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and Mathews testified they had never seen the GUIDELINES before they were shown them during their trial testimony.

[3] Larkin deposition, pages 42-44.

[4] Larkin Deposition, Exhibit 4.

[5] Larkin Depo, 52-53, 64-71, r, p 734-735.

[6] He is also free to instruct department chairs how to guarantee that graduate students will not even be considered for extensions which is what he did in the present case. Larkin Depo. 73-76, 82; Lane Depo. 25-28, 177.

[7] American Heritage Dictionary, 4th Edition, 2000.

[8] The Graduate Dean is responsible for the following supervisory functions over the graduate student: *approves* transfer of credit, *LSU*

exclusively with no input from the Department Head, the Advisory Committee, or the student is the critical decision to allow a graduate student to exceed seven years.

C. As Department Head, Lane's authority over graduate students is limited and circumscribed.

In contrast to the multiple roles assigned to the Graduate Dean in the LSU 1992-94 Graduate Catalog, the Department Head's only role that in any way relates to the graduate student or her progress is to nominate members of the student's special advisory committee who are then formally appointed by the dean of the Graduate School.

As Department Head, Lane was responsible for implementing department rules that apply to psychology department graduate students. Thus, Lane was responsible for implementing the Psychology Department's allowance of nine years to complete requirements for the Ph.D.[9] Even though he knew of this contractual obligation to support graduate students for nine years, Lane testified he ignored this obligation in Petitioner's case because he did not "approve" of the nine year time limit.

Graduate Catalog 1992-1994, *id.* 48; *approves* graduate credit for undergraduates, *id.* at 48; *allows* an Incomplete (I) grade, *id.* at 50; *approves* graduate students to concurrently register at another university, *id.* at 51; *approves resignations*, *id.* at 52; *approves* doctoral programs, *id.* at 56; *serves* as *ex officio* member of the student's advisory committee, *id.* at 56; *appoints* a member of the graduate faculty to represent the Dean on Advisory committees, *id.* at 57; *approves changes* in the makeup of the advisory committee, *id.* at 57; *exempts* students from the continuous registration requirements, *id.* at 58; gives *permission* to hold the Final examination, *id.* at 58; *approves* the final examination committee, *id.* at 58; *certifies* students as having fulfilled all degree requirements, *id.* at 59; and *gives permission* for doctoral students to exceed seven years, *id.* at 59.

[9] Petitioner received this document *Graduate Study in Psychology* in a package as inducement to enroll in the graduate psychology program at LSU in 1992. It states "The maximum time allowed from entrance to the completion of the Ph.D. is nine years." Lane Deposition, Exhibit 23, p. 8.

D. Mathews agreed to support Petitioner for two years.

Early in the Fall of 1999, Petitioner's major professor, Mathews, advised her she needed two years to complete remaining degree requirements. He agreed to support her to allow sufficient time to write the dissertation proposal, get it approved, conduct research, write the dissertation, and pass the final exam. Thereupon, petitioner asked the graduate school how to request an extension of the 7-year limit. The office did not provide a written procedure, but told Petitioner the request must come from the student's Major Professor. After discussions with Mathews, Petitioner wrote for his signature a petition to the graduate dean requesting two years to complete degree requirements as agreed.[10] Later, Mathews requested the request be rewritten to be from Petitioner to Mathews instead of to the graduate school. This second rewrite also requested two years as agreed.[11]

E. Lane undermined petitioner's future right to review by the dean though he had no authority.

It was not until after Petitioner passed her General Exam in November and the semester was nearly over that Mathews asked Petitioner to produce a new request with a timeline separate from the request and condense the two-year timeline into one year. Mathews told Petitioner this change was required because he discovered the dean requires a one year timeline. Petitioner complied.[12] Dean Larkin's testimony verifies he required the timeline to provide him a basis for evaluating year-by-year progress to determine whether each student's progress during the preceding year justified a further year. However, Mathews did not inform Petitioner that Lane insisted that Petitioner be allowed only one year and should not be considered for more extension requests.[13]

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[10] Larkin Deposition, Exhibit 8.

[11] Larkin Deposition, Exhibit 9.

[12] Larkin Deposition, Exhibits 10 and 11.

[13] Unlike *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 221

In December of 1999 Lane prevented Petitioner's petition from being sent to the Dean unless Mathews and her committee agreed to sign a separate non-renewal covenant limiting Petitioner to only one additional year.[14] However (1) the Graduate Catalog gives the Department Head **no** authority to grant or deny extensions, (2) this agreement violated the Psychology Department's own rule allowing nine years, and (3) both Mathews and Lane were well aware that the remaining work would require two years. Mathews stated he agreed "reluctantly, given that this, like I said, is the only game in town,"[15] but he did not inform Petitioner of this.

Lane's required non-renewal covenant was: "We also agree that if she does not complete her degree in that period, we will not support a further request for more time."[16] Petitioner was not privy to this agreement until after she was expelled when Dean Larkin gave her a copy of the document on January 23, 2001.[17]

On 12/14/99, a week after her committee signed Lane's required 12/7/99 secret non-renewal covenant, Mathews stopped petitioner in crowded Audubon Hall and told her to sign the Dean's required one year timeline. The "final" Timeline included language **required by Lane** that Petitioner and Mathews had not discussed. Petitioner signed the 12/14/99 Timeline, but Mathews did not explain the significance of the changes Lane required in this "final" Timeline compared to the other timelines and petitions Petitioner had already submitted. The critical sentences Lane

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(1985) in which Ewing was dismissed after **failing** a critical test, Lane imposed restrictions on petitioner after she successfully **passed** her General Exam.

[14] Trial Transcript Pages 538-539.

[15] Trial record page 541.

[16] Larkin Deposition, Exhibit 5.

[17] Petition dated December 7, 1999. Larkin Deposition, Exhibit 5; Trial Transcript, page 863.

required in the"Timeline Agreement" are:

> I understand that this extension of one year to complete all requirements for my degree, if granted to me by the graduate school, is final. I also understand that if I fail to complete any of the steps listed below on time, I will receive an unsatisfactory grade in Psychology 9000.

Though it appeared to comport with the dean's one-year at a time requirement, Lane knew Petitioner could not complete two years of work in the one year he allowed. In effect, Lane sealed Petitioner's fate in 1999 without informing her that he considered her to be unworthy of more time.

When Petitioner signed the Timeline agreement, she had no reason to suspect that it meant she would be denied future review by the dean. She had received no notice her work was deficient, she had no grades below 'B,' she had just passed her General Exam, and she was making progress in reaching her other goals. Petitioner's primary concern was the "U" clause in the Timeline, knowing that two unsatisfactory, "U," grades in the Spring and Summer of 2000 could justify her expulsion. She perceived no threat in the word "final" in the first sentence. Unlike the separate 12/7/99 petition which Petitioner did not sign or see at the time, which explicitly stated her committee would not support any further extension requests, no words in the Timeline indicated that "final" referred to future extensions, since it only referred to "this" extension. Thus, Petitioner understood the ambiguous "final" statement to refer only to the extension being requested in the Fall of 1999, to refer to the last or "final" in a series of four requests she had already submitted to Mathews, and to it being the end of negotiations for "this" first extension request.

The dean "finally" granted Petitioner her first one-year extension beginning in January of 2000 with no

warning the granting of this extension was a trap.[18]

F. Petitioner made great progress during Year 2000.

During year 2000, Petitioner designed her dissertation research, proposed her dissertation to her committee which approved it, prepared the research materials, sought and received approval from the Institutional Review Board, conducted the experiments, and wrote a first draft of the dissertation.[19] Petitioner received the following May 23, 2000 letter from McDonald:

> This is your annual evaluation by the cognitive faculty of progress in our program. You recently defended your dissertation proposal. You are currently on track with respect to the agreement formed when you petitioned the graduate school for an extension [*sic*: The record shows petitioner was not allowed to petition the graduate school herself]. You must continue to meet the deadlines from this agreement. According to the extension granted by the Graduate School, you must either graduate in the Fall of 2000, or meet all the qualifications for graduation such that you can register for degree only in Spring of 2001. [20]

This was the only letter petitioner received from McDonald during the year 2000. The letter refers to the 12/7/99 secret non-renewal covenant which petitioner did not see and did

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[18] Louisiana Courts and LSU contend Petitioner in advance waived her rights to prior notice before LSU took Petitioner's right to review by the dean, not unlike a cognovit. *D. H. Overmyer Col. Inc. V. Frick Co.:* 405 U.S. 174, 187-188.

[19] Although the Court of Appeals notes on page 4 "plaintiff met only the first of the seven mandatory deadlines," the court fails to note that by December of 2000 petitioner completed all requirements for the degree except final revisions of her dissertation and her final exam which Mathews agreed she could complete within a single semester.

[20] Trial Exhibit, Defendant -19.

not informed petitioner of deficiencies nor that the penalty for not meeting McDonald's "deadlines" was denial of review by the dean which in turn would result in certain expulsion.[22]

During the year 2000, in spite of the "U" clause in the Timeline Agreement, Petitioner earned three satisfactory ("S") grades she earned in research. Mathews showed by his words and deeds he still planned to allow Petitioner additional time needed to complete her work. Mathews testified he believed Petitioner would be allowed the Spring 2001 semester in spite of his own signature on the 12/7/99 petition. Because Mathews thought Petitioner would be allowed another semester, he delayed reviewing her dissertation submissions and assigned her extra duties to supervise two undergraduates in conducting research which also delayed completion of her dissertation.[23]

Petitioner was dismissed without prior notice from the LSU graduate program in Cognitive Psychology effective 1/14/01 when her registration was blocked. She was not informed of the basis for denying her review by the dean.

Thereupon, on 1/16/01 Mathews wrote and signed the following petition which was also signed by all members of Petitioner's advisory committee:

> I support extending Emily Wagner's time to complete her Ph.D. Degree one more semester. She has completed data collection and a first draft of her dissertation. Her dissertation needs additional revision before it is ready to defend. This semester will allow her the time to complete the revisions and defend it.[25]

Lane confiscated this petition and persuaded Petitioner's

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[22] At trial, McDonald stated petitioner had a "gun to her head" but Petitioner was unaware in the year 2000 that Lane and/or McDonald had a gun to petitioner's head.

[23] Trial Record, Page 869.

[25] Larkin Deposition Exhibit 14.

committee to withdraw their support, not based on Petitioner or her work, but simply based on the committee members' signatures on the December 7, 1999 secret non-renewal covenant.[26] It was not until his trial deposition that Lane revealed he believed Petitioner was "unworthy." Even then, the only evidence he proffered was 33 references to a "folder," evidence which was never entered into the record.

G. LSU violated its own PS-48 Appeal Procedure.

After Petitioner was dismissed and Lane confiscated Mathews' January, 2001 petition, Mathews told Petitioner her **only** hope of reinstatement was to go over "their" heads, which presumably referred to Lane and McDonald.[27] Petitioner sought a post-deprivation appeal mechanism to request review of Lane's decision. To that end, she wrote letters which led to a meeting with Dean Larkin.[28] He gave Petitioner a copy of the 12/7/99 Petition (which included the committee's secret non-renewal covenant which she had not previously seen) and also a copy of the 12/14/99 Timeline Agreement. Dean Larkin advised Petitioner that her **only** chance of reinstatement was to persuade her committee to support her. He advised this though he knew it would be futile because of his own 1999 role in helping Lane undermine Petitioner's right to review.[29] Still trying to determine how to appeal, petitioner wrote several more letters that led to meetings with Jeanine Kahn and Dean George Strainl. Finally, Dean Strain gave Petitioner a copy of the PS-48 which is LSU's procedure for **all** student grievances.[30]

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[26] Larkin Deposition, page 137; Lane deposition, pages 207.

[27] Lane testified that at every decision point in this case, he acted at the behest of McDonald (Lane Depo. 19, 34, 48-91, 159-161, 179-180, 192, 194, 206, Record Transcript, 578-579, 890-891, Larkin Depo. Exhibit 18) and ignored Mathews' input (Lane Depo., 143; Trial transcript, p 578).

[28] John Larkin was the dean who administered extensions of the seven year limit but Petitioner was unaware of this when she first met with him.

[29] Larkin Deposition, Exhibit 16.

[30] Lane Deposition Exhibit 30, Pages 200 to 207.

Petitioner followed the PS-48 procedure even though it required her to have the February 22, 2001 Level II hearing with Lane. Lane was not an unbiased decision maker since he had been the accuser, judge, jury, and executioner.[31] Instead of recusing himself, Lane held the PS-48 Level II Hearing, assuming the added role of appellant judge and reaffirmed his prior actions.[32]

Next Petitioner submitted her PS-48 Level III grievance to Dan Fogel, Academic Affairs Dean. The PS-48 **requires** the two faculty members who made the first decision to send to the student and the dean handling the matter a statement of the reasons for the decision. Petitioner never received the required statement of reasons from the department. Instead, Petitioner received a letter from Dean Fogel stating he would not grant relief because Petitioner's seven years expired and the department (Lane) did not support an extension,[33] giving no specific **academic** rationale. Thus he endorsed the transfer of review power from the dean to Lane.

Thereafter, Petitioner submitted an appeal to LSU's Chancellor, Mark Emmert. Since Petitioner still did not know the academic basis for her expulsion, she had no way of defending against unknown criticisms. After meeting with Petitioner, Mark Emmert met with Lane, George Strain, and Jeanine Kahn. John Larkin, the Dean assigned to review extension requests, was not a part of this meeting. For unknown reason, Chancellor Emmert affirmed Lane's

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[31] Lane unilaterally decided Petitioner was unworthy, and then acted upon that bias in 1999 by requiring her committee to sign a secret non-renewal covenant, undermined her future appeal rights, and then in 2001 confiscated the 2001 petition and coerced her committee into withdrawing their support, based solely on committee members' 1999 signatures on the secret non-renewal covenant.

[32] Title 21, Section 455 (a), (b) 1, (b) 3 requires a biased judge to recuse himself.

[33] Defendants Trial Exhibit 26.

decision and also Lane's irrebuttable conclusion that Petitioner's unworthiness justified her expulsion.

Dean Larkin did not review Petitioner's records until his trial deposition. After he reviewed Petitioner's records for the first time, Dean Larkin could not provide any academic reason for Petitioner's dismissal.[34] In spite of Dean Larkin's testimony that there was no academic reason, the Louisiana Courts ignored both the fact that Lane had **no academic** basis for expelling Petitioner. Nor did the court say why the reviewing duty was transferred from Dean Larkin to Lane.

H. Petitioner sues; LSU's summary judgment denied.

Petitioner timely filed this pro se law suit in January of 2002. On July 31, 2003 LSU filed a motion for summary judgment with the trial court. The motion was denied by ad hoc Judge Robert Brinkman on October 6, 2003, citing credibility issues. Even though the decision was an interlocutory decision that did not end the case, defendants requested a supervisory writ to the Louisiana First Circuit Court of Appeal, again seeking summary judgment. The writ application was denied on January 26, 2004. On February 20, 2004, Defendants submitted a writ application to the Louisiana Supreme Court requesting the court to overrule the decisions by the Trial Court and the First Circuit Court of Appeal, again seeking a summary judgment but that court also denied LSU's writ request.

I. Action by The 19th Judicial District Court.

On April 14th and 15th, 2004 a bench trial was held. Honorable Tim Kelley ruled in favor of defendants. The court ruled the seven year limit was constitutional, that the "final" statement in the "Timeline" is not ambiguous, that graduate students have no right to an extension even though the right to an extension was not the issue.

J. Action by The Louisiana First Circuit

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[34] Larkin Deposition, Pages 110-112.

On 12/1/04, Petitioner appealed to the First Circuit Court of Appeal. On 11/4/05, the First Circuit ruled in favor of Defendants, ruling the seven year limit was not unconstitutional. Rather than acknowledging the dean's unfettered discretion to grant or deny extensions and addressing that issue, the court created a fiction that the dean does not really have the authority granted him by the graduate catalog to make exceptions to the seven year limit. The court declared instead that "the Graduate School adopted the standard that it would not grant an extension if the student's department did not support the extension."[35]

The First Circuit affirmed the trial court's conclusion that the "final" phrase is not ambiguous. Before concluding "no violation of Plaintiff's due process rights had occurred," the Court of Appeal used four reasons to justify their conclusion that "the record clearly supports the finding that the decision not to extend an additional year to plaintiff was careful and deliberate."[36] But it was Lane who was careful and deliberate, not the dean . The court cites no academic reasons for LSU's substantive change which prevented Petitioner from being reviewed by the dean for more time. The court also denied Petitioner's rights under the department's nine year rule.[37]

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[35] *Wagner v. Board of Supervisors of Louisiana State University, Robert Mathews, Irving Lane*, 04- 2216 (La. App. 1st Cir. 11/4/05) Page 13.

[36] The "reasons" the First Circuit give are not dispositive and are not substantive academic reason(s) that would justify singling Petitioner out from other similarly situated graduate students and not allowing her case to be reviewed by the dean are: (1) Plaintiff was aware of the seven-year limit, (2) Plaintiff signed the timeline agreement. (3) McDonald sent her a letter which the court misquoted as stating "she would not be allowed to re-enroll in the Spring of 2001 if her degree requirement were not met" [but neither these words nor equivalent words were included in any letter from McDonald during year 2000], (4) Petitioner was allowed to present her position at several levels within the LSU system. *Wagner v. Board of Supervisors of Louisiana State University, Robert Mathews, Irving Lane*, 04- 2216 (La. App. 1st Cir. 11/4/05) Page 10-11.

[37] Lane Deposition. Exhibit 23, Page 8.

VI. ARGUMENT

A. Under Louisiana law, the 14th Amendment, and the Graduate Catalog, did petitioner have a property interest and a substantive right to review by the dean?

1. Petitioner earned her property right to continue.

"The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"[38] "Once that characteristic is found, the types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'"[39] "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[40] The University cannot accept the student's fees and then **arbitrarily** expel her after she invests time, effort, and money.[41]

The First Circuit misrepresented Petitioner's claim:

> [S]he has not cited nor is this court aware of any statutory regulatory or jurisprudential authority to support her proposition that she had either a property interest entitling her to "continued enrollment" at LSU after she exceeded the seven -year time limit or a liberty interest entitling her to receive the degree she sought simply because she chose to pursue a chosen profession.[42]

The First Circuit's trivializes Petitioner's rights by arguing they could find no cases showing a property interest "entitling

[38] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 422 (1982); *Citations omitted.*
[39] Logan at 430. (*citations omitted).*
[40] *Board of Regents v. Roth*, 408 U.S. 564, 577 (U.S. 1972).
[41] *Sharick v. Southeastern University*, 780 So. 2d 136, 139 (Fla. App. 3d Dist. 2000). *Citing Carr v. St. John's Univ.*, N.Y., 17 A.D. 2d 632, *aff'd* 187 N.E. 2d 18 (1962).
[42] *Wagner* at Pages 9-10.

her to 'continued enrollment' at LSU after she exceeded the seven-year time limit." The rights and interests protected as "property" and incorporated into the 14th Amendment's conception of property are varied and often intangible, covering the whole gamut of social and economic interests.[43]

The right at issue is not simply the specific and circumscribed right to an extension. The right at stake is the right Petitioner has in the totality of her investment in her education and her liberty interest is the right she had to continue toward the goal she had already nearly reached.

The First Circuit accepted LSU's construction of the seven year rule that although graduate students have a property interest in their educations during their first seven years, this property right evaporates at the end of seven years, at which time, the Graduate School in the person of the dean, has complete discretion to grant or deny an extension without needing a reason. The First Circuit may believe Petitioner's claim for an extension is comparable to Roth's claim for continued employment[44] but the comparison is inapposite. However, the *Sinderman* case is on point. Odessa College claimed Sinderman had no right to continue his job at the end of his annual contract term but the Court ruled otherwise. After examining "usage" at the college, the Supreme Court ruled Sinderman had *de jure* tenure.[45]

2. Petitioner had a liberty interest in her education.

The First Circuit's statement that Petitioner did not have "a liberty interest entitling her to receive the degree she

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[43] See, *e. g., Barry v. Barchi*, 443 U.S. 55 (1979) (horse trainer's license protected); *Memphis Light, Gas & Water Div.* v. *Craft*, supra (utility service); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (disability benefits); *Goss v. Lopez, supra* (high school education); *Connell v. Higginbotham*, 403 U.S. 207 (1971) (government employment); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits).

[44] *See Board of Regents v. Roth*, 408 U.S. 564 (U.S. 1972).

[45] *Perry v Sinderman* 408 U.S. 593 (1972).

sought simply because she chose to pursue a chosen profession" trivializes the scope of Petitioner's eight year commitment and private investment in the Cognitive Psychology program. She did not simply "want" the degree she sought. She enrolled in the program and had completed all but two of the requirements, invested a large sum of money, uprooted her family, and devoted countless hours to reading, study, and research. The private interest Petitioner lost was massive. Petitioner's graduate credits are not transferable because each graduate program is different. Thus, she is not at liberty to transfer her credit hours and research to another program. She had earned the right to continue in her program as long as there were no legitimate academic reasons for her dismissal. Petitioner's right to remain at LSU as a student in good standing is an "interest of extremely great value,"[46] both to her and to LSU.

Petitioner never argued that graduate students have either the right to continued enrollment or to a liberty interest to pursue their profession. The university always retains the right to dismiss a student for many academic reasons, most stated in the Graduate Catalog. However, the state has no right to foreclose opportunities without there being an academic basis for the foreclosure. In this case, there was no academic reason for Lane to deny her access to the dean's objective review which she is entitled to even under the vague terms stated in the Graduate Catalog.

3. Louisiana grants a property right to education.

The Preamble to the Education Article of the Louisiana Constitution grants to students "learning environments . . . that are humane, **just**, and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop to his full potential."[47] Louisiana

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[46] *Dixon v. Ala. St. Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir.-OLD 1961).

[47] The Louisiana Constitution, Article VIII, Preamble

grants students "the right to accord such [academic] processes and pursuits the fullest protection from interference and disruption."[48] Louisiana recognizes the "privilege and ability of students, faculty, administrators and other personnel to study, teach, administer and perform their duties at the institution of higher learning as well as to do all things necessary and incidental to these pursuits."[49] Through these laws, the Louisiana Legislature has granted Louisiana students a property right to their educations and the right not to be dismissed from a program, once enrolled, unless there is a legitimate academic reason and unless the state follows due process. LSU violated Petitioner's rights to her education.

B. Did LSU afford Petitioner the minimum requirements for due process before she was dimissed?

1. What process was petitioner due?

Petitioner contends that she is entitled to the protections cited in *Loudermill* before the state takes an earned property right.[50] However, even accepting the courts' premise that her dismissal has an academic basis, Petitioner still did not receive the process she was due. In *Horowitz* the Court distinguishes between the due process to be afforded a student dismissed for "academic deficiencies" from the process due a student dismissed for non- academic reasons.[51] To avoid violation of the Due Process Clause of the Fourteenth Amendment for "academic deficiency," the *Horowitz* standard requires the faculty **fully inform** the student of (1) **faculty dissatisfaction**, and (2) of the consequent **threat to the student's graduation and**

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[48] La. R. S. 17: 3101 Declaration of Purposes.

[49] La. R. S. 17:3102 (2).

[50] See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 546 (1985).

[51] Under *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 79 (U.S. 1978), dismissal for nonacademic, disciplinary, reasons might require an opportunity for give and take before dismissal.

continued enrollment.[52] These requirements assume the University is operating in good faith[53] and has a valid academic reason for the student's ultimate dismissal or for threatening a student with dismissal.

Louisiana law does not distinguish between the process due students subjected to disciplinary expulsion from those dismissed for academic reasons. All are entitled to due process, "The notice of expulsion or dismissal shall specifically set forth the ground or grounds upon which expulsion or dismissal is based, as well as contain a short and clear statement of the facts upon which the expulsion or dismissal is based."[54]

2. Did Petitioner receive notice before her dismissal?

Mathews was satisfied with Petitioner's progress toward her goal as evidenced by the grades he issued[55] and his January 16, 2001 letter requesting an extension for her.[56]

The Circuit Court justified LSU's process by stating Petitioner "was given notice during the one-year extension period by letter from Dr. Janet McDonald, a graduate professor in the Department of Psychology, that she would not be allowed to re-enroll in the Spring of 2001 if her degree requirements were not met."[57] To meet the *Horowitz* standard, the McDonald letter must both **fully inform** Petitioner of (1) **faculty dissatisfaction**, and (2) of the consequent **threat to her graduation and continued**

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[52] *Horowitz* at 85.

[53] The Court cannot assume a university official is acting in good faith when his discretion is unfettered since he has no standards to guide him.

[54] La. R. S. 17:3104.

[55] *See* Petitioner's academic transcript at Larkin Depo,, Exhibit 13; Page 4.

[56] Larkin Deposition, Exhibit 14.

[57] The First Circuit misquoted McDonald's May 23, 2000 letter. The letter includes no sanction nor does it include the word "re-enroll." Such a characterization is a substantive change in the terms of the seven year rule since that rule does not require a student's re-enrollment.

enrollment.[58] The first component of the *Horowitz* standard makes no sense unless the faculty dissatisfaction has a legitimate **academic** basis.

The **only** letter Petitioner received from McDonald "during the one-year extension" is the May 23, 2000 letter copied on Page 8.[59] Critically, the letter does not inform Petitioner that she no longer had the substantive right to review by the dean or that her review was transferred to Lane who had already irrebutably presumed Petitioner was unworthy of more time.[60] No mention was made of any dissatisfaction because Mathews was not dissatisfied. Thus, it does not meet the first requirement of *Horowitz*, that the faculty **fully inform** the student of **faculty dissatisfaction**. In fact, it states Petitioner is "on-track."

Without faculty dissatisfaction, the second part of the *Horowitz* standard makes little sense because no facts were presented to justify the serious consequence of dismissal. McDonald's May 2000 letter also violates the second *Horowitz* requirement that the student should be informed of the consequent **threat to her graduation and continued enrollment**.[61] Though McDonald's May 2000 letter states Petitioner "must continue to meet the deadlines from this agreement," it does not state the consequences for Petitioner's failure "to meet the deadlines" is no review by the dean. Further, the referenced "agreement," which Petitioner was not privy to, was not attached to McDonald's May 2000 letter.[62] Nor was she privy to the faculty secret covenant.[63]

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[58] *Horowitz* at 85.

[59] Trial Exhibit, Defendant-19.

[60] See *Vlandis vs Kline*, 412 U.S. 441 (1973).

[61] *Horowitz* at 85.

[62] Larkin Deposition, Exhibit 5.

[63] LSU pretends the 12/14/99 Timeline Agreement (Larkin Deposition, exhibit 6) is the same document as the December 7, 1999 Secret covenant/petition (Larkin Deposition, Exhibit 5) but they are different..

In addition to not meeting the minimum requirements of *Horowitz*, McDonald's letter does not meet the more stringent requirements of Louisiana Revised Statute 17:3104 which requires at a minimum that: "The notice of expulsion or dismissal shall specifically set forth the ground or grounds upon which expulsion or dismissal is based, as well as contain a short and clear statement of the facts upon which the expulsion or dismissal is based." Petitioner did not even receive a notice of dismissal. Her "notice" was her inability to register for the Spring of 2001.

The First Circuit reasoned that Petitioner received notice because she was aware of the seven year limit as stated in the Graduate Catalog. However, the court ignored the dean's critical role. The seven year limit and the dean's role are united and indivisible. The courts' characterization of the catalog's seven year statement as sufficient notice ignores the fact that all students received the notice, but all also received notice of the dean's role.

If LSU had any academic reasons for dismissing Petitioner, they would have readily offered them to the court, but they did not. Since LSU never gave any reasons for Petitioner's dismissal, the First Circuit, themselves made up what they perceived to be LSU's "reasons." Even this list omits any **academic** reason for Petitioner's dismissal[64] simply because there were not any academic reasons. [65]

The procedure approved by the Louisiana Supreme Court and First Circuit violates the 14th Amendment due process notice requirement, Louisiana Revised Statute 17:3104, and *Horowitz*'s minimal notice requirements. The First Circuit's ruling requires neither that LSU have an academic reason nor any reason to expel a student, nor does it require the student

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[64] *Wagner* at 11.

[65] A time limit can be an academic requirement if all students taking a test are completing the identical task and all are held to the same time limit. Neither of these criteria were present in this case.

be informed of dissatisfaction, nor does it require the faculty to explain that continued dissatisfaction will lead to dismissal, nor does it require the student receive notice of her dismissal. Louisiana's courts rubber-stamped LSU's presumption that LSU has unfettered discretion to do what it wants and LSU graduate students have no protection from arbitrary dismissal, or from dismissals based on nonacademic reason, or from substantive changes in their rights.

C. Whether LSU's seven year limit for the Ph.D. program is unconstitutional as written because it is vague?

1. Vague rules vest officials with unbridled power.

When the State grants an official such as a dean the omnipotence to decide who receives a valuable benefit and who is deprived without any standards, "it has enacted 'not a law, but an attempt to make the arbiter in such a case a law in himself.'"[66] In 1937 the Louisiana Supreme Court ruled a state law unconstitutional that gave the Commissioner of Agriculture unbridled power to determine who could sell tomatoes unless the law also provided standards to guide the Commissioner to make this decision.[67]

In the *Dixon* case, the (old) U.S. Fifth Circuit ruled state university administrators' power to dismiss students is not absolute and cannot be applied arbitrarily, but must have a rational basis. The court noted even reasonable regulations are subject to "arbitrary application of the rule to the facts of

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[66] *See United States v. La.*, 225 F. Supp. 353, 391 (D. La. 1963), *citations omitted.*

[67] "The ....objectionable feature of the statute is that the power which it invests in the commissioner of agriculture and immigration [or in this case, the Dean], to determine who may and who may not engage in the business of a wholesale dealer in farm produce, is an arbitrary power, because it is not controlled by any fixed rule or standard, but is left to the unrestricted judgment of the commissioner to say who is worthy and who is unworthy of the privilege of engaging in the business of a wholesale dealer in farm produce. *State v. Chisesi. Same v. Raphael, et al,* 175 So. 453, 457 (La. 1937).

a particular case. . . [and this] is well nigh inevitable when the Board hears only one side of the issue."[68]

2. The seven year rule is unconstitutional because it includes no standards, gives the graduate dean unfettered discretion, and gives the student no appeal rights.

The Graduate Catalog's clause, "[t]his time limit may not be exceeded except by special permission of the dean of the Graduate School," is unconstitutionally vague on its face because it prescribes neither a method for the student to invoke the dean's grace to request an extension nor standards the dean must use to distinguish those granted extensions from those denied extensions. Since there are no standards, the dean can be arbitrary or base his decision on nonacademic prejudices. In this case, the dean exercised his arbitrary, complete discretion to categorize students by allowing 62 students from two to six extensions,[69] or as many extensions as each needed to complete his or her program, while not even **considering** Petitioner for a second extension.

The seven year limit in the 1992-94 Graduate Catalog violates both the Due Process Clause of the 14th Amendment and Louisiana's specific requirements for notice and for giving reasons required by Revised Statute 17:3104 before a student is dismissed or expelled.

D. What was LSU's "purpose" in implementing the seven year limit and does the Dean's unfettered classification of students further the accomplishment of that purpose?

"If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense."[70] "[T]he state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."[71]

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[68] *Dixon* at 157.

[69] Larkin Deposition, Exhibit 3.

[70] Llewellyn, The Common Law Tradition 374 (1960).

[71] *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432,

The district court ruled the seven year rule constitutional based on Chancellor Emmert's belief it was intended to improve the standing of the University. This does not explain how the rule furthers this goal by granting the Dean unfettered discretion to decide which students are granted extensions, without providing academic standards to guide the dean's decision, and without a mechanism for the student, herself, to request an extension. The First Circuit similarly, held the seven year limit is not unconstitutional because:

> [T]he seven-year time limit exists to protect both the student and the university. Specifically, it protects the student from being kept in the program for the purpose of performing extra research,[72] and it protects the university by allowing it to maintain its academic integrity and deal with students who fail to use institutional resources well in making progress toward a degree. Also, the time limit is important from an academic standpoint in that a student receiving a Ph.D. must be very much up-to-date on current knowledge in his or her field. Because knowledge changes quickly in the academic field, a student taking longer than seven years to graduate may no longer be up-to-date on the knowledge of the field.[73]

This exposition, while sounding sensible, is a red herring, distracting from the critical role of the dean as spelled out in the Graduate Catalog's seven year rule. The First Circuit does not explain how LSU can reach the goal of not graduating Ph.D.s with dated knowledge when a large

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446 (1985); *See also Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973).

[72] Given that the outcome sacrifices the student, it is doubtful that the individual student's rights are weighed to "protect" the student.

[73] *Wagner* at 12-13. Note that these are all ad hoc ex post facto reasons since the District Court refused to order Discovery regarding the purpose behind the seven year limit because the court reasoned it was irrelevant.

proportion of the students who needed more time, including 62 in the record, (Larkin Exhibit 3), were actually granted the time they needed, from 9 up to 14 years.[74] The First Circuit gives no indication of how randomly dismissing some graduate students maintains the integrity of the university, especially since whatever tenuous benefit the university derives comes at the expense of the student's state guaranteed right to an education that is "**just**, and designed to promote excellence in order that every individual may be afforded an **equal opportunity** to develop to his full potential."[75] The First Circuit also ignores the fact that LSU's implementation of the seven year limit sacrifices the student's statutory right to receive "notice of expulsion or dismissal [which] shall specifically set forth the ground or grounds upon which expulsion or dismissal is based, as well as contain a short and clear statement of the facts upon which the expulsion or dismissal is based."[76] Further, the courts gave no explanation of why the entire burden of meeting these goals falls on the powerless graduate student who thereby stands to lose all the money, time, and effort she has invested in her education.[77]

The First Circuit countered Petitioner's argument that the Catalog clause gives the graduate dean unfettered discretion by, itself, creating an alternate "standard." The First Circuit opined that "The Graduate School adopted the 'standard' that it would not grant an extension if the student's department did not support the extension"[78] as though the Dean's act of

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[74] Respondents offered no evidence to adduce LSU had ever invoked the seven year limit to dismiss any students besides Petitioner.

[75] The Louisiana Constitution, Article VIII, Preamble.

[76] La. R. S. 17:3104: Content of notification of dismissal.

[77] *See Mathews v. Eldridge*, 424 U.S. 319 (1976) for a procedure for basing the process due on comparison of the private interest and the government interest.

[78] The First Circuit continues: "Thus, it required that the department, rather than the individual student, submit a petition for an extension. This rule furthers the goal of placing authority for making academic judgments

passing his unfettered discretion to the department, still without academic standards or any role for the student, somehow makes it constitutional. In essence, the court endorsed LSU's transfer of Petitioner's substantive right to a fair and impartial hearing (the dean) to a right to an unfair and patently biased hearing, the department (Lane). In this way, Petitioner's right to due process was taken away.

The First Circuit's fiction that LSU adopted a "standard" that extensions would not be granted unless the department supported them ignores the tradition at LSU and other universities that the graduate dean, not the department chair, is over graduate students. And the fiction conflicts with the contractual statement in the Graduate Catalog. Moreover, it conflicts with the facts of *Thurman v. LSU*, 02-0599 (La. App. 1st Cir. 7/15/02) in which Dean Larkin overruled the student's department and informed Ms. Thurman that she would be granted an extension if she, herself wrote a letter to the dean requesting an extension.

The problem LSU hoped the seven year limit would solve is not known. Whatever problem was targeted, it can not be resolved by arbitrary enforcement.

E. Whether Universities changing of students' substantive rights leads to denial of their rights to due process under the Fourteenth Amendment due process clause.

1. Universities overextend the High Court's rulings.

Though University of Michigan and University of Missouri invited the Supreme Court to assume students have a right to education, the schools themselves defined those rights. University of Missouri created a new right just for Ms. Horowitz whereby she could continue her education as long as she maintained good "personal hygiene and

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with those most closely involved in the academic situation of the student, i.e., the faculty members of a department and the department head." *Wagner* at 13.

timeliness" among other things.[79] By analogy, Petitioner had a substantive right at LSU to continue her education subject to review by the dean, but LSU redefined that to make her education contingent on review by the department. And LSU modified its rules and procedures accordingly.[80]

The *Ewing*[81] and *Horowitz*[82] decisions gave courts and universities the idea that universities can apply ex post facto rules to dismiss students as long as the school informs the student that the rights and rules have changed before the student is dismissed. The University may simply suggests the decision was an appropriately academic one. Our forefathers understood the danger of ex post facto laws by prohibiting the Congress from making such laws[83] because Government can make up rules as they go along and individuals have no way of knowing in advance what qualities or conduct will become subject to banishment or punishment. Perhaps because the academy is a "peculiar institution," the courts have exempted universities from the prohibition against ex post facto rules.

In the *Horowitz* case, the Court concluded Ms. Horowitz's expulsion was for academic reasons even though her grades apparently were good. In addition to poor bedside manner, she was cited for missing classes and having poor hygiene. Presumably, good hygiene and promptness were not

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[79] *Horowitz* at 91.

[80] Petitioner's substantive right to review by Dean Larkin had been changed to review by the department and was a fait accompli by the time Chancellor Emmert made his final decision. Dean Larkin was surprised that he was not invited to participate in the meeting when Petitioner's final appeal was denied (Larkin Deposition, 214-215). Dean Larkin was not invited because he became irrelevant when his power was transferred to Lane. The courts accepted the validity of LSU's change without question.

[81] *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 220-221 (U.S. 1985).

[82] *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78 (U.S. 1978).

[83] U. S. Constitution Article 1, Section 10 (1).

mentioned in the Medical School's literature before Ms. Horowitz applied to the Medical School. Before she was expelled, the university did give her notice that these qualities had become critical and endangered her right to continue in her program. The Court accepted the university's "academic" reasoning that students training to be medical doctors should be prompt, have good bedside manner, and good hygiene.

In the *Ewing* case, the Appeal Court held that Ewing was qualified to retake the NBME Part I test because Michigan had a practice of allowing students who failed the first time to take a retest.[84] The Supreme Court overruled the appeal court's finding and agreed with the University that even if no written rules justified Ewings' expulsion in his circumstances, the University had after all given Ewing notice of the change in the form of warnings and had provided him sufficient due process after his expulsion. Because Ewing had poor grades, the Court had no difficulty characterizing his dismissal as an academic decision best left to the education hierarchy.

2. LSU dismissed Petitioner via ex post facto procedures.

Lane's actions effectuating his new power to dismiss Petitioner included: (1) interfering with Petitioner's committee's direct relationship with the dean by twice preventing her petitions from being sent to the dean after they were approved by her chair and committee; (2) Usurping the dean's power to review students to grant or deny extensions; (3) Ignoring his duty to allow Petitioner nine years under the Department's own rule; (4) Requiring Petitioner's committee to sign the secret non-renewal covenant; (5) Requiring Petitioner to sign what he believed was a confession of judgment; (6) Ignoring the fact that under the catalog and LSU's usage, Petitioner was eligible for a second extension; and (7) Interfering with petitioner's relationship with Mathews and other committee members. Ad hoc procedures

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[84] *Ewing v. University of Michigan*, 742 F.2d 913, 916 (CA6 1984).

LSU introduced to back up Lane's unilateral decision to expel Petitioner included allowing Lane to usurp the Dean's power and then pretending that was their usual practice in spite of contrary evidence; Not following the PS-48 procedure requiring Lane to provide reasons for Petitioner's dismissal; and Stating that the PS-48 procedure which is intended for "all" student grievances did not apply to Petitioner.

In spite of Lane's intentional actions, the First Circuit ruled that he was just doing his job. This ruling follows from the First Circuit's interpretation of the Supreme Court's rulings in *Ewing* and *Horowitz* in which the Court justified the school's ad hoc rules used to expel Mr. Ewing and Ms. Horowitz. Universities might sometimes employ ad hoc procedures in unusual or unique circumstances. However, does the breadth of the Court's approval cover Lane's actions? Lane is a state actor, who used ex post facto procedures based on nonacademic prejudices, to take Petitioner's property interest in her education without telling her why or giving her a fair chance to defend herself. Did LSU overreach beyond *Horowitz* and *Ewing* and compromise Petitioner's rights?

F. Under U.S. 42 § 1983, whether Lane is liable for the harm he caused Petitioner when he used an educational cognovit to violate Petitioner's due process rights?

"A cognovit judgment is written authority of debtor and his direction for entry of judgment against him in the event he should default in payment."[85] Cognovit judgments are illegal in most states but in those states where they are legal, the Supreme Court has ruled they can be constitutional if they meet certain requirements. The requirements are: The debtor (1) "voluntarily, intelligently, and knowingly waived the rights it otherwise possessed "[86] (2) he waived his rights "with

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[85] Black's Law Dictionary. Abridged 6th Edition (1991) 178.

[86] *D. H. Overmyer Col. Inc. V. Frick Co.*, 405 U.S. 174, 187-188.

full awareness of the legal consequences "[87] and (3) The contract is not one of adhesion, nor one involving great disparity in bargaining power, nor one when the "debtor receives nothing for the cognovit provision."[88]

Lane required Mathews to incorporate the "final" clause into the December 14, 1999 Timeline Agreement. The First Circuit ruled "the one-year extension, if granted, was final is not susceptible to more than one interpretation."[89] Petitioner never interpreted the "final clause" the way Lane and LSU intended. Two education cases turn on the contested meaning of the word "final": "The decision of the Board of Trustees shall be final."[90] "The action taken by the Board of Trustees shall be final."[91] Both courts agreed with Petitioner's definition, that "final" means the last in a series and the end of negotiations before going to a higher tribunal. Petitioner's understanding of the word "final" is reasonable and comports with both the context of the signing and the dean's original purpose for the timeline. Louisiana law[92] mandates that Petitioner's interpretation should prevail.

Like a cognovit, Louisiana Courts and LSU contend that by signing the "final" statement[93] Petitioner in advance waived her rights to prior notice. However, LSU's procedures do not meet any of the Supreme Court's three

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[87] *Id.*

[88] *Id.*

[89] *Wagner* at 15.

[90] *McConnell v. Howard University*, 818 F.2d 58, 67(D.C. Cir. 1987).

[91] *Manes v. Dallas Baptist College*, 638 S.W. 2d 143, 144 (Tex. App. - Dallas 1982 *writ ref'd n.r.e.*).

[92] La. R.S. art. 2057; La. R.S. art. 2056: In case of doubt that cannot be otherwise resolved, a provision in a contract **must** be interpreted against the party who furnished its text.

[93] Larkin Deposition, Exhibit 6; By accepting LSU's definition of "final," the First Circuit ignored : Louisiana's contract laws; the dictionary definition of the words "ambiguous" and "final;" Petitioner's testimony; and the definitions courts gave the word "final" in similar cases.

criteria for a Cognovit judgment to pass constitutional muster. Petitioner did not "voluntarily, intelligently or knowingly waive rights she otherwise possessed." She did not share LSU's interpretation of the ambiguous Final Clause in the Timeline Agreement. She did not know why she was expelled until January 23, 2001 when Dean Larkin gave her a copy of the non-renewal covenant that Lane required her committee to sign. Next, Petitioner had no clue that LSU intended Petitioner's sign away her future legal rights when she signed the "final" statement. The Timeline Agreement includes no reference to any extensions other than the one being negotiated. Neither does it state explicitly that her signature meant she agreed to be expelled. Next, the "final" cognovit was a contract of adhesion because of the tremendous imbalance in bargaining power. Petitioner's rights evaporated when the LSU computer would not let her register. Finally, Petitioner received nothing for her signature. Her grades were good, she passed her General Exam, and her committee were all in league with her until Lane imposed his will. Petitioner contends this education cognovit is as unconstitutional as a similar strategy applied to an unsophisticated debtor.

VII. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Emily Wagner, Pro se
872 Aster Street
Baton Rouge, LA 70802
(225) 389-9796
Date_____

APPENDICES

Louisiana Supreme Court Judgment	**App. 1**
First Circuit Court of Appeal Opinion[1]	**App. 2**
Louisiana 19th Judicial District Court Judgment	**App. 21**
Oral Reasons for District Court Judgment[2]	**App. 23**

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[1] **Original page numbers in the document are marked with an asterisk followed by a bold number. Page numbers referenced in the BRIEF refer to original page numbers.**

[2] **See Footnote 1.**

The Supreme Court of the State of Louisiana

EMILY ABEL WAGNER

VS. NO. 2006—C—0214

THE BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, ROBERT MATHEWS AND IRVING LANE

IN RE: Wagner, Emily Abel; - Plaintiff; Applying for Writ of Certiorari and/or Review, Parish of E. Baton Rouge, 19th Judicial District Court Div. F, Nos. 491,599; to the Court of Appeal, First Circuit, No. 2004 CA 2216.

April 24, 2006

Denied.

PFC
BJJ
JPV
CDT
JTK

Supreme Court of Louisiana
April 24, 2006
/s/ "_____"
Deputy Clerk of Court
For the Court

*1 NOT DESIGNATED FOR PUBLICATION
STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2004 CA 2216

EMILY ABEL WAGNER
VERSUS
THE BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,
ROBERT MATHEWS AND IRVING LANE

Judgment Rendered: November 4, 2005

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number 491,599
Honorable Timothy Kelley, Judge Presiding
****

Emily Abel Wagner
Baton Rouge, LA — Plaintiff/Appellant, pro se

John P. Murrill
Baton Rouge, LA — Attorney for Defendants/Appellees, Board of Supervisors of LSU, et al.

BEFORE: WHIPPLE, McCLENDON AND WELCH, JJ.

*2 WHIPPLE, J.

This is an appeal from a judgment of the Nineteenth Judicial District Court in East Baton Rouge Parish. Plaintiff, Emily Wagner, appeals the judgment dismissing her claims against the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College (LSU), Robert Mathews and Irving Lane. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

In the Fall 1992 semester, plaintiff enrolled in the graduate program of the LSU Department of Psychology to pursue a doctoral degree in cognitive psychology. At that time, plaintiff had already obtained a bachelor's degree and a master's degree in psychology. As set forth in the 1992-94 LSU Graduate Catalog, a student in the program for a doctoral degree was required to complete the program within seven years from the time the student classified as a doctoral student. Additionally, as provided in the catalog, a student was not to exceed the seven-year time limit except by special permission of the dean of the graduate School. Moreover, the department of Psychology Graduate Study in Psychology handbook further provided that the maximum time that would be allowed to obtain a Ph.D. in psychology was nine years.

In the Department of Psychology, doctoral students usually take graduate level courses during the first two years in the program and then take the general examination in their third or fourth year. After passing the general examination, the student was to use the remaining time in the doctoral program to research and write his or her dissertation and pass the final examination (which involved defense of the

dissertation). However, plaintiff did not pass her general examination until near the end of the Fall *3 1999 semester, only weeks before her seven-year time limit was to expire.[3] Thus, plaintiff began the process of attempting to obtain a discretionary extension of the seven-year limit.

Pursuant to the established guidelines of the LSU Graduate School, a student was not permitted to directly petition the Graduate School for an extension. Rather, the student was required to seek the support of his or her department through his or her major professor and/or advisory committee. Accordingly, plaintiff sought the support of her major professor, defendant Dr. Robert Mathews, in obtaining an extension. After thorough consideration and discussion of the matter with defendant Irving Lane, the chairman of the Department of Psychology at that time, Dr. Mathews agreed to submit a petition for a one-year extension on behalf of plaintiff if plaintiff in turn would agree to and sign a timeline agreement. The timeline agreement set forth seven mandatory deadlines within the one-year extension that plaintiff would be required to meet. Additionally, the timeline agreement provided as follows: "I will complete requirements for the Ph.D. degree by 11/5/2000. I understand that **this extension of one year to complete all requirements for my degree, if granted to me by the graduate school, is final**." The timeline agreement was signed by both plaintiff and Dr. Mathews. (Emphasis added).

Plaintiffs advisory committee then forwarded to the Graduate School a petition letter on behalf of plaintiff

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[3] Although under a technical application of the seven-year rule, plaintiffs last semester would have been the Summer 1999 semester, doctoral students at LSU are actually given seven years plus one semester to obtain their Ph.D. Thus, plaintiff was given until the end of the Fall 1999 semester to meet all requirements to obtain her doctoral degree.

requesting that plaintiff be granted a one-year extension to complete the requirements for obtaining a Ph.D. In the petition letter, the committee agreed "that if she does not complete her *4 degree in that period, we will not support a further request for more time." The timeline agreement signed by plaintiff and Dr. Mathews was attached to the petition letter. Thereafter, Dr. John Larkin, Senior Associate Dean of the Graduate School, granted the petition for a one-year extension with the condition that plaintiff was required to "meet the deadlines to graduate in Dec. 2000 or complete degree requirements in the fall and be eligible to register Degree Only in Spring 2001."

Ultimately, plaintiff did not complete the remaining requirements to obtain a Ph.D. within the one-year extension she had been granted.[4] Despite the timeline agreement she had previously signed wherein she had agreed that the one-year extension would be "final," plaintiff again sought the support of Dr. Mathews in requesting a second extension. Initially, Dr. Mathews and the other committee members supported plaintiff's request for a second extension. However, after being reminded by Dr. Lane, who strongly opposed any further extension, of the committee's previous agreement not to support any further extensions, Dr. Mathews withdrew his support for a further extension.

Because plaintiffs major professor had withdrawn his support for a second extension, the committee likewise withdrew its support. Thus, no petition for a second

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[4] In fact, plaintiff met only the first of the seven mandatory deadlines set forth in the timeline agreement that she had signed, which was to have her dissertation proposal completed and approved by her committee by March 20, 2000. She fulfilled this mandatory deadline on the exact deadline, March 20, 2000.

extension was forwarded on plaintiff's behalf to the Graduate School. Accordingly, at the expiration of the one-year extension, plaintiff was dropped from the doctoral program and was not allowed to re-enroll for the Spring 2001 semester. After numerous unsuccessful appeals within the university system, plaintiff instituted this suit against LSU, Dr. *5 Mathews and Dr. Lane, contending that she had detrimentally relied upon assurances by Dr. Mathews that she would be given adequate time to complete her degree requirements; that Dr. Lane tortiously interfered with plaintiff's contract with LSU by coercing Dr. Mathews to sign an agreement that he would not support any further time extensions and by refusing to submit the petition for a second extension to the Graduate School; and that Dr. Lane acted maliciously to harm plaintiff. Plaintiff further contended that Dr. Lane's tortious interference with her contract rights and abuse of his rights in acting maliciously toward her constituted a violation of the Louisiana Unfair Trade Practices and Consumer Protection Act.

Emily Wagner requested that Dr. Lane be ordered to pay damages; that the clause in the petition letter submitted by plaintiff's advisory committee that they would not support a further request for more time be stricken from the petition letter; that Dr. Lane and LSU be enjoined from further interfering with plaintiff's contract rights with LSU and her relationship with Dr. Mathews and other members of her committee; that Dr. Mathews be ordered to produce and process a new request for a time extension for plaintiff to complete her dissertation; and that LSU be ordered to process the request for additional time without prejudice and to exempt plaintiff from any requirements she was unable to meet.

Although plaintiff did not assert any constitutional claims in her petition, her contentions as listed in the pre-trial order included claims that defendants had violated her due process and equal protection rights by the procedures they utilized to prevent her from being considered for a second extension of time.

Following a bench trial, the trial court ruled that the seven-year rule was not facially unconstitutional and that her due process rights had not been *6 violated by LSU. The court found that plaintiff did not have a property right to a second extension and that LSU had treated plaintiff fairly and was justified in exercising its discretion to deny her a second extension. With regard to the timeline agreement, the court found that the wording of the agreement was clear and unambiguous and that plaintiff fully understood that there would be no more extensions. Accordingly, the trial court dismissed all of plaintiff's claims against defendants. From the judgment dismissing her claims, plaintiff now appeals.

Although plaintiff did not list any specific assignments of error in her appellate brief, the arguments raised in her brief can be summarized as follows: (1) the trial court abused its discretion in blocking discovery; (2) the trial court erred in finding that the seven-year limit, as written and as applied, did not violate plaintiff's due process rights; (3) the trial court erred in finding no violation of plaintiff's equal protection rights; and (4) the trial court erred in denying plaintiff's claims under Louisiana contract law; and (5) the trial court erred in ignoring defendants' violations of Louisiana consumer protection law.

TRIAL COURT'S RULING LIMITING DISCOVERY

We first consider plaintiff's challenge to the trial court's ruling denying her motion for document production.

During the course of the proceedings below, plaintiff filed a motion for document production, in which she sought: documents received by the Graduate School to justify time extensions granted to sixty-five students she had identified as exceeding the seven-year limitation to obtain their doctoral degrees; for each of the sixty-five students who were granted additional time to complete their degrees, their applications to the Graduate School with transcripts from previous schools, their applications to their major departments, their *7 acceptance letters from the Graduate School; their acceptance letters from the applicable major departments; evaluations of these students by their departments or by any faculty members; records of all general exam or specialty exam results; Institutional Review Board requests submitted by each student; Institutional Review Board Action on Protocol Approval Requests for each request submitted; communications from each student to their professors, advisory boards, departments and/or the Graduate School regarding requests or appeals of decisions; all "PS-48: Appeal Procedures Available to Students" submitted by each student; and all correspondence responding to PS-48 appeals.

Defendants objected, contending that the information sought was not reasonably calculated to lead to the discovery of admissible evidence, was not relevant and was voluminous. Defendants further contended that even if any of the information sought could be deemed relevant, the privacy interests of the students involved outweighed any possible relevance. Following a hearing, the trial court denied plaintiffs motion for document production as overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

A trial court has broad discretion in discovery matters, including the right to refuse or limit discovery of matters that are not relevant to the issues or unduly

burdensome. LSA-C.C.P. arts. 1422, 1426; Johnson v. Louisiana Department of Labor, Office of Workers' Compensation, 98-0690, P. 8 (La. App. 1st Cir. 5/14/99), 737 So. 2d 898, 902-903; see also Bless Home Health Agency v. Louisiana Department of Health and Hospitals, 99-0936, p. 8 (La. App. 1st Cir. 5/22/00), 770 So. 2d 780, 785. The trial court's discretion in such matters will not be disturbed on appeal absent a clear showing of abuse of that discretion. Johnson, 98-0690 at p. 8, 737 So. 2d at *8 903. Considering the scope of the request herein, the issues presented by the pleadings and the applicable law governing her alleged claims, we cannot conclude that the trial court abused its discretion in denying plaintiff's request that defendants produce the voluminous and detailed personal documentation sought by her.[5]

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[5] In a footnote in her appellate brief, plaintiff also complains that the trial court erred in overruling a previously rendered order in limine on the day of trial, thereby hindering her ability to counter the previously excluded evidence on such short notice.

However, the record reveals that while the court had previously ordered, pursuant to a motion in limine filed by plaintiff, that certain documents would be inadmissible at trial, plaintiff herself, when conducting a trial deposition, offered and introduced documents and elicited testimony about events covered by the order. Thereafter, in a second trial deposition, defense counsel likewise referred to related evidence previously deemed inadmissible, given plaintiff's previous actions in ignoring the order granting her own motion in limine.

Thus, when plaintiff moved to strike the complained of evidence and testimony in the trial depositions on the day of trial, the trial court denied the motion, noting that plaintiff had waived her rights to enforcement of the ruling when she voluntarily put those matters at issue. We find no error in this ruling by the trial court. See Combs v. Hartford Insurance Company, 544 So. 2d 583, 585-586 (La. App. 1st Cir.), writ denied, 550 So. 2d 630 (La. 1989).

THE DUE PROCESS CLAIMS

Plaintiff further argues that the seven-year limit, as written and as applied to her, violated her procedural and substantive due process rights. The Due Process Clause of both the United States Constitution and the Louisiana Constitution prohibit the deprivation of "life, liberty, or property" without due process. U.S. Const. amend. XIV; La. Const. art. I, § 2. Procedural due process is concerned with the means or procedures used by the state to effect the deprivation of a protected right. With regard to academic decisions, procedural due process does not require a hearing, but instead "far less stringent procedural requirements," such as notice of dissatisfaction with the student's progress and the danger that dissatisfaction poses to continued enrollment. See Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78, 85-90, 98 S. Ct. 948, 952-955, 55 L. Ed. 2d 124 (1978). Substantive due process, on the other hand, may be broadly *9 defined as the constitutional guaranty that no person shall be arbitrarily deprived of life, liberty or property. Thus, the essence of substantive due process is protection from arbitrary or unreasonable action. Standard Materials, Inc. v. City of Slidell, 96-0684, p. 13 (La. App. 1st Cir. 9/23/97), 700 So. 2d 975, 985 n.14.

Nevertheless, to prevail on any due process claim under the Fourteenth Amendment of the United States Constitution or Louisiana Constitution, article I, section 2, a plaintiff must show the existence of some property or liberty interest which has been adversely affected by state action. Johansen v. Louisiana High School Athletic Association, 2004-0937, p. 7 (La. App. 1st Cir. 6/29/05), ___ So. 2d ___, ___. Property interests are not created by the United States Constitution, but by existing rules that stem from independent sources such as state law. Board of Regents of

State Colleges v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972). To have a property interest protected by due process, a person must have more than an abstract need or desire for it. She must have a legitimate claim or entitlement to it rather than a unilateral expectation of it. Roth, 408 U.S. at 577, 92 S. Ct. at 2709.

Plaintiff herein contends that she had a property right to "continued enrollment [in the LSU graduate program beyond the seven-year time limit and one-year discretionary extension] free from arbitrary interference by the State" and a liberty interest in pursuing her chosen profession. However, she has not cited nor is this court aware of any statutory, regulatory or jurisprudential authority to support her proposition that she had either a property interest entitling her to "continued enrollment" at LSU after she exceeded the seven-year time limit or a liberty interest entitling her to *10 receive the degree she sought simply because she desired to pursue a chosen profession.

In fact, in two cases cited by plaintiff, the United States Supreme court has considered whether the right to "continued" enrollment in university programs is a federally protected right under the due process clause of the Fourteenth Amendment and has refused to definitively recognize such a constitutionally protected property interest. Regents of University of Michigan v. Ewing, 474 U.S. 214, 222-223, 106 S. Ct. 507, 512, 88 L. Ed. 2d 523 (1983); Horowitz, 435 U.S. at 84-85, 98 S. Ct. at 952. Instead, the Court merely assumed the existence of the right and disposed of the cases on the basis that no violation had occurred.

In the instant case, absent any evidence or authority for the proposition that plaintiff had a property right or a liberty interest in continued enrollment in the Ph.D. program in the Department of Psychology at LSU beyond the seven-year limit and the one-year discretionary extension, we

cannot conclude that the trial court erred in finding no such constitutionally protected interest existed.

Moreover, even assuming that such a protected property interest or a liberty interest in obtaining a Ph.D. did exist, we further find no error in the trial court's conclusion that no violation of plaintiff's due process rights had occurred. We note that plaintiff was aware of the seven-year time limit set forth in the Graduate Catalog and of the rule that any extensions were discretionary. Further, plaintiff herself signed the timeline agreement, acknowledging that the one-year extension the Graduate School had in its discretion awarded her was "final." Additionally, plaintiff was given notice during the one-year extension period by letter from Dr. Janet McDonald, a graduate professor in the Department of Psychology, that she would not be ***11** allowed to re-enroll in the Spring of 2001 if her degree requirements were not met. Also, plaintiff was allowed to. present her position on the discretionary denial of a second one-year extension at several levels within the LSU system Moreover, the record supports the conclusion that defendants did not act arbitrarily in the exercise of their discretion in not supporting or awarding a second extension. To the contrary, the record clearly supports the finding that the decision not to extend an additional year to plaintiff was careful and deliberate. See Horowitz, 435 U.S. at 84-85, 98 S. Ct. at 952; see also Ewing, 474 U.S. at 223-228, 106 S. Ct. at 512-5 13. Accordingly, we find no error in the trial court's denial of plaintiffs due process claims. Plaintiff's arguments with regard to these claims lack merit.

THE EQUAL PROTECTION CLAIM

Plaintiff next contends that the trial court erred in denying her equal protection claim. Specifically, she

contends that she established at trial that she had been subjected to disparate treatment as compared to sixty similarly situated LSU Ph.D. students who were each allowed two or more one-year extensions. Thus, she contends that the trial court erred by not requiring defendants to provide competent evidence to justify their disparate treatment of her. Plaintiff further asserts that if all students were expelled at the end of seven years with no exceptions, this policy would not violate the equal protection clauses of the Louisiana and United States Constitutions. However, plaintiff alleges, because the Graduate School has unbridled discretion and does not require that a rational basis exist for dismissing students after seven years, defendants can conceal the reasons for dismissal, such as age, gender, race, national origin, religion, politics, employment, conflicts with the student, or revenge.

***12** The Fourteenth Amendment of the United States Constitution and article I, section 3 of the Louisiana Constitution provide that all persons are entitled to equal protection of the law and require that "persons similarly situated receive like treatment." Whitnell v. Silverman, 95-0 1 12, pp. 9-10 (La. 12/6/96), 686 So. 2d 23, 29-30. But the equal protection provisions of the federal and state constitutions do not require absolute equality or precisely equal advantages. Johansen, 2004-0937 at p. 10, ___ So. 2d at ___.

The guarantees of equal protection under the federal and state constitutions differ and, therefore, usually require separate analysis as to whether each has been violated. Progressive Security Insurance Company v. Foster, 97-2985, p. 17 (La. 4/23/98), 711 So. 2d 675, 685-686. However, where no fundamental or express constitutional right or "suspect" class (such as race or religion), nor any other enumerated class such as birth, age, sex, culture or political

affiliation is alleged as the basis for discrimination, the use of another classification is subject to the minimal or lowest level of scrutiny under the guarantees of both constitutions. American International Gaming Association, Inc. v. Louisiana Riverboat Gaming Commission, 2000-2864, p. 15 (La. App. 1st Cir. 9/11/02), 838 So. 2d 5, 17; Such a classification is unconstitutional only if proven to be not rationally related to any legitimate state interest. American International Gaming Association, Inc., 2000-2864 at p. 15, 838 So. 2d at 17; Johansen, 2004-0937 at p. 10, ___ So.2d at ___.

At trial, Dr. George Strain, the interim dean of the LSU Graduate School in the Spring of 2001; Dr. Mark Emmert, the Chancellor of LSU; Dr. John Larkin, associate dean of the Graduate School at the relevant time; and Dr. Irving Lane, chairman of the Department of *13 Psychology at that time, testified as to the purpose of the seven-year time limit and the discretionary extension rule. Their testimony establishes that the seven-year time limit exists to protect both the student and the university. Specifically, it protects the student from being kept in the program for the purpose of performing extra research, and it protects the university by allowing it to maintain its academic integrity and deal with students who fail to use institutional resources well in making progress toward a degree. Also, the time limit is important from an academic standpoint in that a student receiving a Ph.D. must be very much up-to-date on current knowledge in his or her field. Because knowledge changes quickly in the academic field, a student taking longer than seven years to graduate may no longer be up-to-date on the knowledge in that field.

With regard to the Graduate School's discretion in granting extensions beyond the seven-year limit, the record reveals that the Graduate School adopted the standard that it

would not grant an extension if the student's department did not support the extension. Thus, it required that the department, rather than the individual student, submit a petition for an extension. This rule furthers the goal of placing authority for making academic judgments with those most closely involved in the academic situation of the student, i.e., the faculty members of a department and the department head. Clearly, while all students exceeding the seven-year limit may be "similarly situated" in that they did not meet the degree requirements within the designated time limit, they may not be similarly situated with regard to the particular circumstances for that failure or their academic, research and writing abilities. The rule of requiring the department to petition for an extension on behalf of the student furthers the legitimate ***14** interest in having academic decisions made by those most qualified and informed to make such decisions.

Based on the foregoing and the record as a whole, we find no merit to plaintiff's argument that the actions of defendants and the methods utilized by LSU regarding time limitations and granting of extensions are not rationally related to a legitimate state interest and violate equal protection. Clearly, the individual merit of each student's need for additional time governs whether such an extension is granted. See Johansen, 2004-0937 at pp. 10-11, ___So. 2d at __ . Accordingly, we find no error in the trial court's determination that plaintiff failed to establish a violation of her federal or state equal protection rights. Plaintiff's arguments with regard to the trial court's dismissal of her equal protection claim also lack merit.

THE CONTRACT CLAIMS

Plaintiff further contends on appeal that the trial court committed error in ignoring the evidence supporting her claims of violations of her Louisiana contract rights. Specifically, she contends that she had an implied contract right to continued enrollment free from arbitrary dismissal; that defendant Dr. Lane tortiously interfered with her contract rights; and that she detrimentally relied upon defendant Dr. Mathews' promises in word and deed to allow her an additional semester to complete her degree requirements. Moreover, with regard to the timeline agreement signed by plaintiff in which she acknowledged that the one-year extension, if granted, would be "final," plaintiff contends that the trial court erred in refusing to nullify the agreement on the bases that plaintiff did not understand the meaning of the word "final," plaintiff signed the agreement under duress, and the agreement was not offered in good faith.

***15** Because the existence of the timeline agreement refutes certain elements of plaintiffs claim of "implied" contract rights, we first turn to plaintiffs contention that the trial court erred in refusing to nullify the timeline agreement. A contract constitutes the law between the parties. Massachusetts Indemnity and Life Insurance Company v. Humphreys, 93-2025 (La. App. 1st Cir. 10/7/94), 644 So. 2d 818, 820. To determine the parties' intent, courts must first look to the words and provisions of the contract. When they are clear and explicit, no further interpretation may be made in search of the parties' intent. LSA-C.C. art. 2046; Osborne v. Ladner, 96-0863, p. 11 (La. App. 1st Cir. 2/14/97), 691 So. 2d 1245, 1254. Whether or not a contract is ambiguous is a question of law. Osborne, 96-0863, p. 11, 691 So. 2d at 1254.

Based upon our review of the timeline agreement signed by plaintiff and defendant Dr. Mathews, we conclude

that the provision that the one-year extension, if granted, was "final" is not susceptible to more than one interpretation. Rather, the language is clear in its meaning that this would be the only one-year extension allowed. Accordingly, we find no merit to this argument.

With regard to plaintiffs contention that the agreement should have been nullified because she was force to sign it under duress, we likewise reject plaintiffs argument. A contract is formed by the consent of the parties. LSA-C.C. art. 1927. Consent is vitiated "by duress of such a nature as to cause a reasonable fear of unjust and considerable injury to a party's person, property, or reputation." LSA-C.C. art. 1959. Nonetheless, a threat of doing a lawful act or exercising a right does not constitute legal duress. LSA-C.C. art. 1962; Averette v. Industrial Concepts., Inc., 95-1286, p.5 (La. *16 App. 1st Cir. 4/30/96), 673 So. 2d 642, 645, writ denied, 96-1510 (La. 9/20/96), 679 So. 2d 442.

In the instant case, plaintiff was faced with the "threat" that she would not be able to re-enroll for the Spring 2000 semester due to the expiration of the seven-year time limit. Clearly, defendants had every right to enforce the seven-year-rule, which would have resulted in plaintiff being "dropped" from the Ph.D. program. The fact that defendants conditioned the discretionary grant of a one-year extension to plaintiff upon her agreement that such an extension would be the "final" one granted simply does not constitute legal duress. See Averette, 95-1286 at p. 7, 673 So. 2d at 645 n.2. Accordingly, we find no merit to plaintiff's contention that the trial court erred in failing to nullify the timeline agreement.

Given the valid timeline agreement, we conclude that plaintiff's claim of an implied contract right to continued enrollment clearly lacks merit and was properly rejected by

the trial court. Additionally, we note that the alleged arbitrary interference of which she complains was simply Dr. Lane's action in seeking to have the timeline agreement honored, as chairperson of the Department of Psychology. Such action can not be classified as arbitrary under the circumstances of this particular case.

Moreover, with regard to plaintiff's contention that she detrimentally relied upon the assistance of defendant Dr. Mathews, whose actions she contends indicated that she would be allowed an extra semester to complete her degree requirements, we note that there was conflicting testimony by plaintiff and Dr. Mathews on these events, and the trial clearly credited the testimony of Dr. Mathews. Moreover, as established by the evidence of record, plaintiff, and not Dr. Mathews, was charged with the responsibility as a student to understand the requirements for degree-only registration for *17 Spring 2001, to which she agreed in the timeline agreement. Further, this ability to register for the Spring 2001 semester was contingent on her having completed all degree requirements by the end of the Fall 2000 semester.

For these reasons, we find no error by the trial court in rejecting plaintiff's Louisiana contract claims. These arguments also lack merit.

THE LOUISIANA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW CLAIM

Plaintiff also contends that the trial court erred in rejecting her claim that defendants violated the Louisiana Unfair Trade Practices and Consumer Protection Act ("the Louisiana Consumer Protection Act"), LSA-R.S. 51:1401 et seq by falsely advertising to prospective students. The Louisiana Consumer Protection Act provides that "[u]nfair methods of competition or unfair or deceptive acts or

practices in the conduct of any trade or commerce are hereby declared unlawful." LSA-R.S. 51:1405(A). A practice is considered unfair when it offends established public policy and when the practice is unethical, oppressive, unscrupulous or substantially injurious to consumers or business competitors. Family Resource Group, Inc. v. Louisiana Parent Magazine, 2000-1986, p. 7 (La. App. 1st Cir. 11/9/01), 818 So. 2d 28, 32. Whether a practice is considered unfair must be determined on a case-by-case basis. Walker v. Louisiana Health Management Company, 94-1396, p. 9 (La. App. 1st Cir. 12/15/95), 666 So. 2d 415, 421, writ denied, 96-0571 (La. 4/19/96), 671 So. 2d 922. Plaintiff's argument is based upon the claim that the Department of Psychology handbook entitled Graduate Study in Psychology "promised" that nine years would be allowed to complete the Ph.D. However, to the contrary, the record establishes that pursuant to the Graduate School requirements, as set forth in the Graduate Handbook, a student was subject ***18** to the seven-year time limitation for obtaining a Ph.D., with the possibility of being granted a discretionary extension.

The Department of Psychology placed a further requirement on graduate students, as each department was permitted to do, by limiting the maximum time that would be allowed to obtain a Ph.D. in psychology to nine years. To be accepted into a Ph.D. program at LSU, a graduate student had to be accepted into both the Graduate School and individual department from which the student sought the Ph.D. A graduate student was required to meet all conditions, of both the Graduate School and the student's individual department. In fact, the Graduate Study in Psychology handbook clearly provides that the student should familiarize himself or herself "with all the

information in this packet, together with the requirements and regulations in the LSU Graduate Catalog."

Thus, it was readily apparent to any prospective student that the requirements of both the Graduate Catalog and the Graduate Study in Psychology handbook were applicable to doctoral students in psychology. Accordingly, we find no manifest error in the trial court's conclusion that the statements in the Graduate Study in Psychology of which plaintiff complains did not give rise to a claim under the Louisiana Consumer Protection Act.

CONCLUSION

For the above and foregoing reasons, the May 13, 2004 judgment of the trial court dismissing plaintiff's claims against defendants with prejudice is affirmed. Costs of this appeal are assessed against plaintiff, Emily Wagner.

AFFIRMED.

19TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

EMILY ABEL WAGNER	:	NUMBER 491,599
	:	
VERSUS	:	SECTION 22
	:	
THE BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE; ROBERT MATHEWS; and IRVING LANE	:	

FINAL JUDGMENT

This matter came before the Court on April 14 - 15, 2004, for a bench trial on the merits. Considering the evidence submitted at trial and the arguments advanced by the parties:

IT IS ORDERED, ADJUDGED, AND DECREED that all of the claims asserted by the Plaintiff against all of the Defendants be and they hereby are DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that final judgment is hereby entered against the Plaintiff and in favor of the Defendants.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that court costs are assessed against the Plaintiff

and awarded to the Defendants, including the cost of the trial deposition of Irving Lane, and excluding the cost of the trial deposition of John Larkin and the costs associated with Defendants' unsuccessful motion for summary judgment and subsequent supervisory writ applications to the Louisiana First Circuit Court of Appeal and Louisiana Supreme Court.

JUDGMENT READ, RENDERED, AND SIGNED in Baton Rouge, Louisiana, this 13 day of May, 2004.

/s/ TIMOTHY E. KELLEY
JUDGE, NINETEENTH JUDICIAL DISTRICT COURT

A TRUE COPY
/s/ "_____"
DY. CLERK OF COURT

FILED
2004 MAY- 4 AM 10:47
DOUG WELBORN
CLERK OF COURT E.B.R. PARISH

I HEREBY CERTIFY THAT ON THIS DAY A COPY OF THE WRITTEN REASONS FOR JUDGMENT/JUDGMENT/ORDER WAS MAILED BY ME WITH SUFFICIENT POSTAGE AFFIXED TO: E.Wagner, J. Murrill, Done and Signed on 5/19/04.

/s/ "_____"
DEPUTY CLERK OF COURT

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST EATON ROUGE
STATE OF LOUISIANA
SECTION 22

EMILY ABEL WAGNER

V. SUIT NO. 491-599

THE BOARD OF SUPERVISORS, LSU,
ET CETERA, ET AL.

THURSDAY, APRIL 15, 2004

ORAL REASONS FOR JUDGMENT

THE HONORABLE TIMOTHY E. KELLEY,
JUDGE PRESIDING

APPEARANCES:

EMILY ABEL WAGNER,
PLAINTIFF IN PROPER PERSON

JOHN MURRILL FOR DEFENDANTS

Reported by: Diane Didier, CCR

*2 THURSDAY, APRIL 15, 2004

ORAL REASONS FOR JUDGMENT

THE COURT: All right. As an opposition to the summary judgment that was filed by the defendant, the plaintiff, in opposition to the summary judgment, filed what she styled as a Declaratory Judgment Motion. I'm going to take that up first because that has to do with the, in large part, the due process argument..

The plaintiff in this Declaratory Judgment Motion has asked the court to find or declare unconstitutional the seven-year rule stated in the 1992 to '94 LSU Catalog, and to order the plaintiff's reinstatement to the Cognitive Psychology Program, to order the defendants to pay damage to plaintiff, and to enjoin the defense from expelling other students under the unconstitutional terms. Technically, the declaratory portion of it can only be the portion which goes towards declaration of the constitutionality of the seven-year rule in the catalog, because the rest of them are ordinary proceedings and not declaratory, and the rest of the requested relief is, in fact, the requested relief in the main demand. But, with regard to whether or not the seven-year rule stated in the Catalog is unconstitutional, I must deny that claim. It is not unconstitutional. There is good reason that has been stated in this court why a time period must be set that has an effect on the rating and standing at the University. The *3 testimony of Dr. Emmert was very instructive on this point. There is a basis for it. It is not arbitrary in any way. There are no -- on its face, it is not facially unconstitutional. It does not deny any substantive rights to any students. They are given prior notice of it in the catalogs, and there's a reasonable basis for the time period set forth therein, and that this has been explained in open court. Now -- so I'm going

to deny the declaratory judgment request. With regard to the rest of the claim, Ms. Wagner, I'll make real quick on the front end. You're not going to win. Okay? And I'm going to tell you why, but I'm going to tell you that I have been tremendously impressed with your sincerity of what you are attempting to do. It is not lost on the court that you truly believe that you have been wronged. That is not lost on the court at all. And I sympathize with the emotional state that puts you in, knowing ahead of time you're not going to win this thing.

There is no doubt whatsoever in my mind you truly believe you were wronged. There's always no doubt in my mind that you were not wronged. Okay? That you were treated in a fair manner by the University. Legally, I have to agree with the defendants' position that there is not a -- with regard to a denial of your due process, in this particular case, there is no property right associated with what you claim to have been denied. What you claim to have been denied affectively is a second extension. While the*4 effect of the denial of the second extension is in your mind to deny you the education and the opportunity to get your doctorate, the action complained of is the denial of the second extension. You have, as a student at LSU, no proprietary right to a second extension. You actually have no propriety right to a first extension. The catalog makes it clear that it's discretionary and must be approved by the dean. Now, you were given the benefit of the discretionary extension the first time. You were not given a benefit of a discretionary extension the second time.

The question then becomes one of whether or not you were unfairly denied to the extent that it may have had an effect on your contractual rights that you may have when you entered into a contract with LSU to pay them tuition for education. Okay? The court does not believe that it reaches

that extent. The reasons that have been given are legitimate reasons in the university context. There are time limits upon which things must be done. If there are extenuating circumstances, those extenuating circumstances are evaluated and it seems that LSU, in all instances that were referred to, had evaluated, not just your circumstances, but other students' circumstances, and taken each on a case-by-case basis and utilized their discretion that they properly had in determining whether or not to allow further extensions and time within which to complete your work.

*5 Now as Chancellor Emmert described and as - Who was the dean? One of the other witnesses described the difference between undergraduate and graduate with regard to grades in classes and whether or not mere satisfactory completion of grades in class work translates to satisfactory performance at all. Testimony has been clear that in undergraduate school, yes, it does. But the graduate school is drastically different, and that mere satisfactory class work does not necessarily translate to entitlement to a degree, because there's too many other factors involved.

The court feels that the law is very clear that as long as there is a sufficient basis given for the refusal to allow you to reenter past the time limit set forth in which you were given notice for, if there is sufficient reasons for that, then there's not any denial of any rights. You simply just didn't get it done within the rules that you knew about on the front end and that you agreed to live by when you signed your contract by signing your check, and putting in your application and then accepting it. You agreed to live by the rules and regulations of the University. The rules and regulations of the University, as the court has already said, are rationally based, and are valid, and not unconstitutional, and do not deprive anyone on their face of any rights, require that certain things must be done within a certain amount of

time. In your case, they were not done within a certain amount of time. You were given beyond the *6 seven years and one semester that you originally had. You were given an additional year. In giving that additional year, the court - It's been very clearly shown to the court that the department was reluctant to extend that any further than the one-year time period, based upon past performance issues, or lack of performance issues, I should say. There was a reason that is a justifiable reason for them to put a cap on the time limit. They did so. You were aware of the time limit.

I believe that the language set forth in the time line, which is P-6, is clear and unambiguous. I believe that you, based upon the testimony of the individuals involved, Dr. Mathews, and - please give me the names of the other two people on the Panel.

MR. MURRILL: Dr. McGill and Dr. Hicks.

THE COURT: Dr. McGill and Dr. Hicks, that - not so much Dr. Hicks. Dr. McGill. That you did fully understand that you were being given a benefit of an additional year, but you would not be given an additional year after that. There would be no more extensions. You had to complete this matter. I understand what you tried to argue to me as the ambiguity in it. The court does not accept that as a reasonable explanation. In fact, the court has to strain to attempt to find an understanding in its mind of what you believed it really meant. It is so clear and unambiguous, that it's hard to fathom anyone not understanding exactly what those words say. It's final. That's the extension. It's final. You agreed to that *7 extension. You signed a contract You failed to abide by it. The failing was not on behalf of the University. The failing was on your behalf. And they were justified in refusing to allow you to reenter

during the second semester, which is Spring 2001 of that year; Therefore, they have - they are not the cause of any damages that you may feel that you incurred.

I'm going to find in favor of the defendants, dismissing all claims of the plaintiff. Cost assessed against the plaintiff. I have deposition cost associated with Dr. Lane, which is the trial deposition that the defense put in, those costs are assessed against the plaintiff as a court cost because the defendant prevailed, and they required that deposition, trial deposition in order to put forth their case interest, there is no interest because there is no judgment. Is there any aspect of the case I have not addressed, Ma'am, as far as you can tell?

MS. WAGNER: There is a consumer protection act, the advertising claims.

THE COURT: Denied.

MS. WAGNER: Okay, I would like to appeal, your honor.

THE COURT: Yeah, you'll have an opportunity and I will explain to you how you can do that. Okay?

MS. WAGNER: Okay.

THE COURT: But I just - You know, this is one of those rulings I'm not happy about, but the bottom line is, I truly believe that your case *8 is - You don't have a case, but I don't like it, because frankly, I like you and I feel for you, but you haven't proved your case here in court is the bottom line.

Sir, would you - Anything I've not addressed with respect to the defendants' position?

MR. MURRILL: Not that I'm aware of, your honor.

THE COURT: All right sir, would you please put together a judgment reflective of my judgment here in court stating that the matter is --- That I found in favor of defendants, dismissing the claims of the plaintiff in full. Costs assessed against the defendant. Costs assessed against the plaintiff, I apologize. Costs of the Lane deposition assessed against the plaintiff as a court cost. I don't think there's any other court costs that are recoverable for you that I'm aware of, because that's the only deposition y'all put in, isn't it?

MR. MURRILL: It's the only one we put in. I would just ask that we also be awarded cost of the Larkin deposition, because we had to attend.

THE COURT: Well, you had to attend, but you did not ask to submit the deposition in favor of your case.

MR. MURRILL: Okay.

THE COURT: And so, because it was not something that you wanted to put before the court or needed for your case, I'm not going to give you those costs. What I'm going to give you is what the code says you can have, trial deposition that *9 you utilized in your case in chief. And so, I'll give you Lane, but not the other one. Make sure you give Ms. Wagner a copy of the proposed judgment at least three days prior to providing it to me so that she can object to the form, pursuant to 9.5 of the Uniform Rules. I

forget the number of the rule, but there's a rule that requires that he has to let you see the judgment before I sign it. All right, that's all I'm making sure he takes care of.

* * *

19TH JUDICIAL DISTRICT COURT

CERTIFICATE

I, Diane Didier, CCR, Official Court Reporter, Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana, do hereby certify that the foregoing nine pages constitute a true and accurate transcript of the aforesaid matter as taken by me on the stenotype machine, to the best of my knowledge and ability.

Witness my hand this 26th day of April 2004.

/s/ Diane Didier
Official Court Reporter
19th Judicial District Court
CCR #91293
Certificate Expires 12-31-04

(2)

No. 06-379

FILED
OCT 17 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

EMILY ABEL WAGNER,

Petitioner,

versus

THE BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, ROBERT MATHEWS, IRVING LANE,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of Louisiana, First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A. Facts

Ms. Wagner, seeking a Ph.D. in psychology, enrolled in LSU's Graduate School in the Fall 1992 semester. She already possessed a Bachelor's Degree in psychology and a Master's Degree in psychology. At all relevant times, defendant-respondent Irving Lane was the Chair of the Department of Psychology, and defendant-respondent Bob Mathews was Wagner's major professor.

Like most universities, LSU allows doctoral students seven years in which to complete the program; if they have not completed their degree requirements within that time, they are not awarded their degree, although the Graduate School has the discretionary power to extend the deadline. These provisions are clearly stated in the LSU Graduate Handbook:

> The program for the doctoral degree must be completed within seven years from the time a student is classified as a doctoral student. This time limit may not be exceeded except by special permission of the dean of the Graduate School.

The time limit went into effect in 1988, four years before Ms. Wagner arrived at LSU. In practice, all doctoral students are actually allowed seven years plus one extra full semester.

In the Department of Psychology, doctoral students typically spend the first two years taking graduate level courses, then take the General Examination, which is ordinarily the most rigorous test in the doctoral program. The students then spend their remaining time researching and writing the dissertation, which they defend at a Final

Examination. Students who enter the program with a Master's Degree in Psychology – like Ms. Wagner – typically obtain their Ph.D. in four years, and thus the seven-year time limit is not a problem.

Emily Wagner did not pass the General Exam until November 5, 1999, during her final semester in the program. Thus, with only a few *weeks* left in her seven years, Wagner had not submitted a final draft of her dissertation *proposal*, had not performed her research and collected her experimental data, had not written her dissertation, and had not taken the Final Exam.

Aware that she was drastically behind schedule and that she could not possibly finish the program without more time, Ms. Wagner approached her major professor, Respondent Bob Mathews, about her need for an extension. Dr. Mathews told Wagner he would support her request for more time. Mathews then discussed the request with Respondent Irving Lane. As Chair of the Department of Psychology, Dr. Lane was responsible for maintaining the academic integrity of the Department, and he originally opposed the request because he considered Wagner to be a mediocre student whose performance did not merit additional time. Lane testified that "this was probably among the most difficult decisions that I had while I was Chair." Eventually, Lane agreed to support the request, but only upon the condition that the extension of time would be Wagner's final opportunity to obtain her degree.

On December 14, 1999, Mathews and Wagner signed a written agreement that if she failed to attain her degree within the one additional year, she would not be granted any further extensions of time:

> I will complete requirements for the Ph.D. degree by 11/5/2000. I understand that this extension of one year to complete all requirements for my degree, if granted to me by the graduate school, is final.

The agreement also set forth a series of intermediate deadlines that Wagner would be required to satisfy.

At trial, Ms. Wagner asked Dr. Mathews whether he agreed with Dr. Lane's insistence that she would have to finish her degree in the one extra year. He responded: "I agreed with it reluctantly, given that this, like I said, is the only game in town. It was my only chance of helping you finish your degree." In other words, there was a good faith difference of opinion between Mathews, who was the major professor looking out for the interest of his student, and Lane, who was the Chair looking out for the interest of the entire Department. But Mathews also recognized that the only alternative was for Ms. Wagner to be dropped from the program immediately without her degree.

Mathews subsequently submitted a petition to the Graduate School seeking one additional year in the program for Ms. Wagner. Mathews forwarded with the petition a copy of the written agreement and time-line signed by Wagner. In early January 2000, John Larkin, Senior Associate Dean of the Graduate School, granted the petition subject to the condition that Wagner graduate in December 2000 or be eligible to register "degree only" in the Spring 2001 semester.

Ms. Wagner did not complete her remaining degree requirements during the extra year that was granted to her; indeed, she met only one of the six deadlines contained in the time-line she signed in December 1999. At

the end of the extra year, she had not even completed a first *draft* of her dissertation.

The written agreement signed by Wagner in December 1999 included the statement, "I understand that this extension of one year to complete all requirements for my degree, if granted to me by the graduate school, is final." Notwithstanding the clear and unambiguous language, Wagner wrote a letter to Dr. Mathews on January 12, 2001, asking for a second extension of time.

Mathews originally agreed to support the request for a second extension. Mathews testified at trial that his main motivation was to see Ms. Wagner, his student, get her degree, and he was willing to support her in every way he could; therefore, he originally supported the request even though he too had signed the "final" agreement.

However, Dr. Lane strongly opposed a second extension for Ms. Wagner. Lane believed it would compromise the standards of the Department to grant a second extension to Ms. Wagner, particularly in light of the written "final" agreement that had been signed by the parties. On January 19, 2001, Lane met with Mathews and the other members of Wagner's advisory committee and voiced his opinion that the committee should abide by the earlier "final" requirement. At the end of the meeting, there was no resolution to the situation; instead, Mathews and the other committee members agreed to "think about it" some more.

That evening, Dr. Mathews spoke on the telephone with Ms. Wagner, and they discussed again the reasons why she had not completed her degree requirements

during the extra year. The next day, January 20, after considering all of the issues involved in Ms. Wagner's request for a second extension, Mathews wrote her a letter withdrawing his support of her request.

Without the support of her major professor and Chair of the Department, the Graduate School would not consider Ms. Wagner's request for a second extension. Thus, she ran out of time and was automatically dropped from the program without earning her degree.

B. Action Of The Trial Court

In January 2002, Ms. Wagner filed suit in a Louisiana state court against LSU, Dr. Lane, and Dr. Mathews. In her petition, she claims that the seven-year time limit is unconstitutional, and that she was denied due process while a graduate student. She also claims that the defendants arbitrarily and tortiously interfered with her efforts to obtain her doctoral degree.

A bench trial on the merits was held on April 14-15, 2004. At the conclusion of the trial, the judge ruled from the bench in favor of the defendants as to all claims asserted against them. Judgment was entered on May 4, 2004.

Ms. Wagner appealed the judgment to the Louisiana Court of Appeal for the First Circuit. On November 4, 2005, the First Circuit affirmed the trial court judgment in its entirety. Rehearing was denied on December 22, 2005.

Ms. Wagner filed an application with the Supreme Court of Louisiana for a writ of review, but that court denied her application on April 24, 2006.

SUMMARY OF ARGUMENT

A. The Due Process Clause Is Inapplicable

All of Ms. Wagner's legal claims arise under the Due Process Clause. However, no property rights are implicated by Ms. Wagner's allegations; instead, the decision whether to grant or deny a request for more time is a discretionary function of the Graduate School. Therefore, the Due Process Clause and its procedural protections are not even implicated by her allegations.

B. Ms. Wagner Received Due Process

Ms. Wagner received multiple notices of LSU's dissatisfaction with her academic performance, and she was expressly notified of the threat of her possible dismissal. Therefore, under *Board of Curators v. Horowitz*, 435 U.S. 78 (1978), she received due process. Respondents actually extended more protection to Wagner than the minimal requirements established by the Constitution, as they granted Wagner face-to-face meetings with numerous faculty members and administrators.

C. The "Void For Vagueness" Doctrine Is Inapplicable

The "void for vagueness" doctrine does not apply in this civil litigation because the provision regarding extensions of time does not require "exaction of obedience to a rule or standard," nor does it "strip a participant of his rights." Instead, the provision is simply an affirmation of the authority of the Graduate School to extend the deadline. Furthermore, the Graduate School has specific written guidelines to assist both the major professor and

the Dean in determining whether to grant or deny a request for more time.

D. Ms. Wagner Was Not Treated Arbitrarily

Ms. Wagner cannot show she was treated arbitrarily. Each individual request for an extension of time must be considered on its own merits, and such academic decisions are not susceptible of a formulaic approach. The Respondents articulated a legitimate academic basis for their decision not to support a second extension of time for Wagner, and they articulated a legitimate academic basis for their decision to support certain other extensions requested by certain other students.

E. Dr. Lane Conducted Himself Entirely Within Accepted Academic Norms

Dr. Lane conducted himself at all times in a manner consistent with *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985). As Chair of the Department of Psychology, he was the person charged with the ultimate responsibility for maintaining the Department's academic standing and reputation within the Graduate School. His decisions regarding Petitioner's first and second requests for more time were made in good faith, were based on the Petitioner's poor academic progress through the doctoral program, and were consistent with accepted academic norms.

F. Ms. Wagner Misconstrues The Departmental Handbook

The 1992 Graduate Catalog required all doctoral students to complete the program within seven years. The 1992 handbook for the Department of Psychology stated that "the maximum time allowed from entrance to the completion of the Ph.D. is nine years." The policies are not inconsistent, and the department policy does not create any right or entitlement to nine years in the program. Instead, the department policy simply establishes a maximum of nine years in the program, regardless of whether the Graduate School might be inclined to grant more time.

G. The "Final" Agreement Is Perfectly Lawful

There is nothing unlawful or unconstitutional about the "final" agreement. That agreement did not require Ms. Wagner to sign away any rights, nor did it require her to waive notice of anything. She simply agreed that the first extension of time would be her final opportunity to obtain her degree, and that no additional extensions of time would be granted to her. The language of the agreement is clear and explicit, and Wagner's assertion that she did not understand the meaning of the term "final" is not credible.

ARGUMENT

A. The Due Process Clause Is Inapplicable

Ms. Wagner claims that she was denied due process.

The Due Process Clause of the Fourteenth Amendment says that the States shall not "deprive any person of

life, liberty, or property, without due process of law." The Due Process Clause itself does not create any "property" rights; instead, such rights must be created and defined from independent sources, such as state law. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

In the present case, LSU afforded Ms. Wagner precisely the same opportunity that was afforded to all doctoral students: to complete all requirements for her degree within seven years. Once Ms. Wagner was admitted to the doctoral program in the Fall 1992 semester, perhaps she had a property right subject to due process protection to continue for the allotted seven years, provided she continued to satisfy all academic requirements.

However, any right to continue in the program ceased to exist when Ms. Wagner failed to obtain her degree within seven years. Once her seven years elapsed, she had no right at all to remain in the program; instead, her only option was to obtain an extension of time from the Graduate School. The Graduate School has the discretion to grant or deny such a petition; the Graduate School exercised its discretion to grant the plaintiff's first request for an extension, and the Graduate School exercised its discretion and refused to consider the plaintiff's second request because it was not supported by her major professor and the Chair of the Department.

Because the decision to grant or deny a petition for more time is a discretionary function of the Graduate School, there were no property rights at stake when Wagner sought her extensions, and the Due Process Clause and its procedural protections are not even implicated by her allegations. Both the trial court and the

Louisiana First Circuit Court of Appeal concluded that the Due Process Clause did not apply to Wagner's claims.

Ms. Wagner argues that she has a right "in the totality of her investment in her education," and she refers to the time, money, and effort she spent during her eight years in the program. But "to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. Ms. Wagner can articulate no such legitimate entitlement.

Ms. Wagner argues that "Louisiana grants a property right to education" and that she has "the right not to be dismissed from a program, once enrolled, unless there is a legitimate academic reason and unless the state follows due process." (Pet. at 16-17.) But she cites no specific law in support of her argument; instead, she cites broad introductory language from the Preamble to Article VIII of the Louisiana Constitution and from the Declaration of Purpose accompanying the Louisiana Preservation of Educational Process Act. But the Preamble to Article VIII merely states that "the goal of the public educational system is to provide learning environments . . . that are humane, just, and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop to his full potential." This language does nothing to create a specific property right in favor of Ms. Wagner to continue in the doctoral program beyond seven years. And the Declaration of Purpose specifically states:

> It is recognized that attendance by a student . . . at an institution of higher learning [is] not compulsory as to individuals concerned. *Their presence at*

> *the institution of higher learning is a privilege, not a right.*

La. R.S. 17:3101 (emphasis added).

Thus, Ms. Wagner's argument is undone by the very statute upon which she relies for support.

B. Ms. Wagner Received Due Process

Ms. Wagner argues that she was denied due process when she was dropped from the program in January 2001.

Even though the Due Process Clause is not implicated by Ms. Wagner's allegations, the evidence is clear that the Respondents afforded her significantly more process than the minimal safeguards required by the Constitution. The definitive case is *Board of Curators v. Horowitz*, 435 U.S. 78 (1978). Under *Horowitz*, a student dismissed for academic reasons is not entitled to a hearing before the decision-maker; instead, it is only necessary that the student receive notice of the school's dissatisfaction with his or her academic performance and the threat of possible dismissal. *Id.* at 85.

Unquestionably, Ms. Wagner received notice of the Department's dissatisfaction with her academic performance and was aware of the threat of her possible dismissal. The Graduate Catalog stated that "the program for the doctoral degree must be completed within seven years from the time a student is classified as a doctoral student," and that "this time limit may not be exceeded except by special permission of the dean of the Graduate School." Wagner testified that she was very familiar with the contents of the graduate catalog. She knew that she failed to complete her program within the seven years. She knew

that she was allowed to continue in the program only because the Graduate School granted her an extension of time. She knew that she signed a written agreement that the first extension was "final." She knew that she received a letter during the extra year from the Department expressly notifying her that she had to graduate in the Fall 2000 semester or be eligible to register "degree only" in the Spring 2001 semester. And she knew that she did not complete the degree requirements during the extra year.

Furthermore, even though *Horowitz* did not entitle Ms. Wagner to a hearing prior to her dismissal, she was granted numerous face-to-face meetings with faculty members and administrators in her effort to get a second extension. On January 23, 2001, she met with John Larkin, Senior Associate Dean of the Graduate School. On February 2, 2001, she met with Jeanine Kahn, Assistant Vice Chancellor for Academic Affairs. On February 5, 2001, she met with George Strain, Interim Vice Chancellor for Research and Graduate Studies. On February 22, 2001, she met with Respondents Irving Lane and Bob Mathews. And on May 9, she met with Mark Emmert, Chancellor of Louisiana State University.

Ms. Wagner alleges that as she met with these faculty members and administrators, they did not always follow the appeal procedures established in PS-48, a University document governing student appeals. However, every single faculty member and administrator who testified at trial stated that PS-48 does not apply to a student like Ms. Wagner who simply runs out of her allotted time. The individual academic departments have the independent authority to decide which students they wish to accept or reject. For example, when a student desires to enroll in the graduate program, their application must be separately

accepted by both the Graduate School and the academic department. If a student's application is accepted by the Graduate School but rejected by the department, that student may not pursue a Ph.D. at LSU in that department, and the Graduate School cannot force the department to accept the student.

Similarly, if a student runs out of time and desires an extension, the academic department must first decide whether it wants to continue the student. If the department does not want to continue the student, the Graduate School does not have the authority to order the department to take the student back. Thus, when Dr. Lane and Dr. Mathews withdrew their support and Ms. Wagner filed an appeal under PS-48, there was no remedy available to her, and PS-48 could not apply. Ms. Wagner's only option was to convince her advisory committee (including Mathews) to reinstate their support for her request for a second extension.

Finally, Wagner argues that LSU failed to comply with the Louisiana Preservation of Educational Process Act, which requires that "the notice of expulsion or dismissal shall specifically set forth the ground or grounds upon which expulsion or dismissal is based, as well as contain a short and clear statement of the facts upon which the expulsion or dismissal is based." La. R.S. 37:3104. However, Ms. Wagner fails to quote the prior statute, which expressly limits the Act's application to students who are expelled or dismissed for participating in riots on the grounds of the institution, for intentionally destroying or defacing property belonging to the institution, or for refusing to obey any lawful order of a peace officer at the institution. La. R.S. 37:3103. The Act has no application whatsoever to Ms. Wagner's situation.

C. The "Void For Vagueness" Doctrine Is Inapplicable

Ms. Wagner argues that the provision in the handbook regarding extensions of time is unconstitutionally vague. She also makes the related argument that the provision is unconstitutional because it has no standards and vests the Dean of the Graduate School with unfettered discretion to grant or deny requests for more time.[1]

The "void for vagueness" doctrine requires that penal statutes be drafted with minimal guidelines to prevent arbitrary and/or discriminatory enforcement. *See, e.g., Kolender v. Lawson*, 461 U.S. 358 (1983). Application of the doctrine has generally been limited to criminal laws; however, the Court has applied the doctrine to civil cases in which "the exaction of obedience to a rule or standard . . . was so vague and indefinite as really to be no rule or standard at all. In short, the exaction must strip a participant of his rights to come within the principle of the cases." *Boutilier v. Immigration & Naturalization Service*, 387 U.S. 118, 128 (1967). The Court has also stated that "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not

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[1] At several places in her Petition, Ms. Wagner states that the seven-year limit itself – as opposed to the discretionary authority of the Graduate School to extend the limit – is unconstitutional. (Pet. at 21-25.) However, she makes no attempt at any legal analysis to show that the seven-year limit is unconstitutional. Instead, all of her substantive arguments are directed at the Graduate School's authority to extend the deadline. In any event, the trial court made an express finding that the time limit is constitutional: "There is good reason that has been stated in this Court why a time period must be set that has an effect on the rating and standing at the University. The testimony of Dr. Emmert was very instructive on this point. There is a basis for it. It is not arbitrary in any way. There are no – on its face, it is not facially unconstitutional."

constitutionally severe." *National Endowment For The Arts v. Finley*, 524 U.S. 569, 589 (1998).

The "void for vagueness" doctrine has no application in the present matter. The Graduate Handbook states that "this [seven-year] time limit may not be exceeded except by special permission of the dean of the Graduate School." In the language of *Boutilier*, the provision does not require "exaction of obedience to a rule or standard," nor does it "strip a participant of his rights." Rather, the provision is simply an affirmation that the Graduate School has the authority to extend the time-limit. Like the federal government in *Finley*, the State of Louisiana, acting through the LSU Board of Supervisors, was not acting as a sovereign when it vested the Graduate School with the authority to extend the time-limit.

Furthermore, and contrary to Ms. Wagner's assertions, the Dean of the Graduate School does not have absolute discretion to grant or deny petitions; instead, the Graduate School has specific written guidelines to assist both the major professor and the Dean in determining whether to grant or deny a request for more time:

1. Petitions must be initiated by the student's major professor no earlier than the semester immediately preceding the 7-year deadline for completion of the degree.

2. The petition must address the extenuating circumstances related to the student's progress toward the degree and failure to complete by the deadline.

3. The petition should elaborate upon the student's current status in the program and his/her progress toward completion of the degree requirements.

4. The petition should include a specific time-frame in the request for an extension. The requested extension may not exceed one academic year. No open-ended extensions will be granted.

5. The petition must satisfy the above criteria and must be unanimously supported and signed by the chair/head and the student's committee, excluding the Dean's Representative, before it will be considered by the graduate dean.

Thus, the guidelines require that the Graduate School be presented with a petition that articulates specific extenuating circumstances for the student's failure to graduate on time, that articulates the student's current standing in the program, and that articulates a specific time-frame for progress towards the degree. The guidelines were available in the Graduate School office to both faculty and students.

D. Ms. Wagner Was Not Treated Arbitrarily

Not only has Ms. Wagner failed to show that the extension provision is facially unconstitutional, she has failed to show that it was applied in discriminatory fashion. In her Petition, she refers to sixty-two other graduate students who allegedly received at least two extensions, and she argues that because she was treated differently – because she was only allowed one extension – she was treated unlawfully. She does not claim that she was discriminated against on the basis of any suspect category, she simply claims that she was treated arbitrarily.

The Respondents have articulated a basis, in detail and at great length, for their decision not to grant a second extension to Ms. Wagner: she made extremely poor progress during her allotted seven years, her own major professor felt she lacked "basic research and writing skills," the Chair of the Department felt that her performance in the program was "unsatisfactory" and "poor," she signed an agreement that was crystal clear and utterly unambiguous that her first extension of time was her final opportunity to obtain her degree, and she failed to complete the academic requirements for her degree even after *eight* years.

At trial, Ms. Wagner questioned Dr. Lane and Dr. Mathews about two of the students on the list of sixty-two. In response, Lane and Mathews articulated legitimate academic justifications for granting additional time to those students. Thus, not only did the Respondents articulate legitimate academic reasons for *not* granting more time to Ms. Wagner, they also articulated legitimate academic reasons why they *did* grant more time to the graduate students regarding whom they were questioned.

Finally, the decision whether to grant an extension of time to a student is precisely the sort of "genuinely academic decision" referred to in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985). Such academic decisions are simply not susceptible of the kind of formulaic approach that Ms. Wagner would impose on LSU. Instead, each individual case must be considered on its own individual merits. The trial court made an express finding regarding this precise issue:

> If there are extenuating circumstances, those extenuating circumstances are evaluated. And it

> seems that LSU, in all instances that were referred to, had evaluated, not just your circumstances, but other students' circumstances, and taken each on a case-by-case basis and utilized their discretion that they properly had in determining whether or not to allow further extensions and time within which to complete your work.
>
> As the Louisiana First Circuit noted:
>
> Clearly, while all students exceeding the seven-year limit may be "similarly situated" in that they did not meet the degree requirements within the designated time limit, they may not be similarly situated with regard to the particular circumstances for that failure or their academic, research, and writing abilities.

E. Dr. Lane Conducted Himself Entirely Within Accepted Academic Norms

Ms. Wagner claims that Dr. Lane denied her due process on several occasions, including in December 1999, when he conditioned his support of her first extension on her signing the written agreement with the "final" language, and again in January 2001, when he refused to support her request for a second extension.

Ewing is the definitive case establishing the substantive due process protections to which a student is entitled regarding an adverse academic decision. In *Ewing*, the Court imposed a heightened burden on students seeking judicial review of the substance of academic decisions:

> When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment. Plainly they may not override it

> unless it is such a substantial departure from the accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Id. at 225.

Thus, Ms. Wagner's burden under *Ewing* is to show that Dr. Lane's conduct amounted to a substantial departure from accepted academic norms.

Regarding the first request for more time, the Respondents were faced with a request from a student who did not come close to finishing her program in the allotted seven years. Students who enter the program with a Master's Degree, like Ms. Wagner, typically take the General Exam at the end of the third year and complete the program in four years. Ms. Wagner did not even pass the General Exam until November 1999, just a few weeks prior to the expiration of her seven years. Dr. Lane felt that Ms. Wagner's academic performance was "unsatisfactory" and "poor." Under these circumstances, it would have been entirely reasonable and perfectly in accordance with accepted academic norms to have immediately dropped Ms. Wagner from the program and not to have supported her *first* request for additional time. Instead, Lane agreed to support the request, but subject to the condition that she would not be granted any further extensions. Lane exercised his professional judgment in good faith and conducted himself totally in accordance with accepted academic norms.

In January 2001, when the plaintiff requested the second extension of time, Dr. Lane was now faced with a request from a student with a demonstrated record of poor

progress who was unable to complete her degree requirements even after *eight* years in the program. Even more significantly, Ms. Wagner had previously signed a clear and unambiguous agreement that her first extension was final. Nothing could have been more reasonable than for Lane, as Chair of the Department and the person charged with the ultimate responsibility for maintaining the Department's academic standing and reputation within the Graduate School, to expect that everyone would abide by the express terms of the "final" agreement.

Both the trial court and the Louisiana First Circuit expressly stated that the decision not to grant the second extension was reasonable.

F. Ms. Wagner Misconstrues The Departmental Handbook

The 1992 Graduate Catalog required all doctoral students to complete the program within seven years. The 1992 handbook for the Department of Psychology stated that "the maximum time allowed from entrance to the completion of the Ph.D. is nine years." Wagner argues that she actually had a right under the departmental policy to a full nine years in the program.

The policies are not inconsistent. The Graduate School policy entitles the graduate student to seven years, after which he/she may remain enrolled only if a discretionary extension is granted by the Graduate School. At the same time, the policy of the Department of Psychology establishes a maximum of nine years, regardless of whether the Graduate School might consider an extension of time. The

department policy does not create any right or entitlement, it simply plāces a ceiling on the limit of time a student has.

Such particularized departmental policies are specifically contemplated by the Graduate School Catalog, which states: "Satisfaction of the minimum requirements of the Graduate School as stipulated in this catalog in no way relieves doctoral students of responsibility for satisfying any additional requirements deemed appropriate by the graduate faculty of the degree programs in which they are enrolled."

Respondents also reiterate that Ms. Wagner *knew* the Graduate School would not allow her to continue beyond seven years without an extension of time. Her claim that she actually had a right to nine years is not supported by the evidence and is contrary to her own personal knowledge.

G. The "Final" Agreement Is Perfectly Lawful

Citing *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), Ms. Wagner characterizes the "final" agreement that she signed in December 1991 as an unconstitutional "educational cognovit."

Overmyer is distinguishable legally and factually. That case dealt specifically with the "ancient legal device" of the cognovit judgment, whereby a debtor confesses judgment against himself and waives in advance his right to notice, hearing, and possibly even appearance. *Id.* at 176.

Conversely, Ms. Wagner was not forced to sign away any rights, nor did she waive notice of anything. She simply agreed that the first extension of time would be her

final opportunity to obtain her degree, and that no additional extensions of time would be granted to her. It would have been perfectly lawful for Lane and Mathews to agree amongst themselves, without ever informing Ms. Wagner, that they would not support a second extension. Instead, they made her aware of the condition, and she signed her acknowledgment of the condition when she executed the "final" agreement. There is absolutely nothing inappropriate, unlawful, or unconstitutional about that agreement.

Ms. Wagner argues – as she has throughout this litigation – that the "final" agreement should be invalidated because she never understood "final" to mean that she would not be granted any further extensions of time. But the language of the agreement is clear and explicit: "This extension of one year to complete all requirements for my degree, if granted to me by the graduate school, is final." In his oral reasons for judgment, the trial judge made a specific finding that the language was clear and unambiguous:

> It is so clear and unambiguous that it's hard to fathom anyone not understanding exactly what those words say.

The First Circuit agreed:

> [W]e conclude that the provision that the one-year extension, if granted, was "final" is not susceptible to more than one interpretation. Rather, the language is clear in its meaning that this would be the only one-year extension allowed.

CONCLUSION

All of the legal arguments contained in Ms. Wagner's Petition to this Court arise under the Due Process Clause, yet there were no property or liberty interests at stake that would give rise to a due process claim. Furthermore, even if she could demonstrate such a right, the evidence shows that she received due process and was treated at all times in a manner consistent with accepted academic norms. She has failed to articulate any legitimate reason why this Court should grant her Petition.

The Petition should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

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EMILY ABEL WAGNER, *Petitioner*

versus

THE BOARD OF SUPERVISORS OF
LOUISIANA STATE UNIVERSITY
AGRICULTURAL AND MECHANICAL COLLEGE,
ROBERT MATHEWS, IRVING LANE, *Respondents*

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On Petition For a Writ of Certiorari
To The Court of Appeal of Louisiana,
First Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

There would have been no case if Respondents (Hereinafter Respts.) had provided a legitimate academic basis for their decision to expel Petitioner Emily Wagner (Hereinafter Wagner). This they did not do. Even in Respts.' Opposition Brief, except for unsubstantiated hints that her skills are deficient, no evidence was offered to justify Respt. Lane's (Hereinafter Lane's) conclusion that Wagner was not "worthy" or less worthy than other similarly situated graduate students, each allowed as much time as needed.

A. Under The Due Process Clause, Petitioner Wagner Earned the Right to Objective Review by the Dean and to be Told the Legitimate Academic Basis For Expulsion.

Wagner contends the seven year limit as stated in the LSU Graduate Catalog is void for vagueness because it prescribes neither a procedure to determine eligibility for an extension nor fundamental criteria to determine who is worthy of more time. Even under this vague rule, the Dean clause grants the graduate student the expectation that before she is discharged, she has the right to objective evaluation by the Graduate Dean John Larkin (Hereinafter, Larkin) who is responsible for fairly and equitably deciding which extensions he will grant.

In Wagner's case, Lane went to a great deal of trouble to ensure that Larkin would never review her 2001 request for extension.[1] He did this because he knew that if Larkin

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[1] In 1999, Lane consulted with Larkin to find out how he could prevent Wagner from requesting a 2001 extension (Larkin Deposition, Page 73, Lane Deposition, pages 25-28, 32). Lane followed Larkin's directions by requiring Wagner's committee to sign a pledge that "we also agree that if she does not complete her degree in that period, we will not support a further request for more time." (Larkin Deposition, Exhibit 5). To ensure Wagner would be dismissed, Lane also required her to sign what amounts to a confession of judgment (Larkin Deposition, Exhibit 6). In January 2001, Lane confiscated the new petition requesting an extension completed by Mathews and signed by her committee (Larkin Deposition, Exhibit 14). Lane then bullied Wagner's committee into withdrawing the

objectively evaluated Wagner, Larkin would have granted the 2001 extension. Lane never taught Wagner and he testified that he ignored Mathews' opinion about her "worth."

B. Wagner Did Not Receive Due Process.

Respts. assert that Wagner received due process because she met with University officials after she was expelled. They ignore the fact that the fundamental requirements of due process cannot be met unless the aggrieved party is informed of the reason(s) for the deprivation. Even now, 5½ years after Wagner's expulsion, the reasons Respts. give to justify her expulsion are that Lane concluded she was not "worthy" [2] of more time.[3] Such vague conclusory statements cannot be disproven since by nature, such statements are reflections of prejudices within the mind of the speaker.

Though LSU's PS-48 states it applies to **all** student grievances,[4] LSU did not follow this grievance procedure because they did not give Wagner the required **reason** for the decision to dismiss her.[5] Even if Respts. have an academic reason for Wagner's dismissal, the fact that they did not inform her of that reason violated her due process rights.

C. The Seven Year Limit is "so vague and indefinite as really to be no rule or standard at all."[6]

Respts. first state that the seven-year time limit does not strip a participant of his rights and then contradict that statement by stating it is simply an "affirmation that the

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January 2001 petition letter so they would not botch his **careful and deliberate** plan to deny Wagner the opportunity to complete her education (Lane Deposition, Pages 31-37).

[2] Respt.'s statement that Lane concluded Wagner was "mediocre" is not supported in the record.

[3] *See* D below for a complete discussion.

[4] Lane Deposition, Exhibit 30, Page 2. Note the PS-48 lists two exceptions but neither exception relates to this case.

[5] Lane Deposition, Exhibit 30, Page 5.

[6] *Boutilier v. Immigration & Naturalization Service*, 387 U.S. 118, 128 (1967).

Graduate School has the authority to extend the time-limit."[7] Obviously, those whose time-limit is not extended are thereby "stripped of their rights."[8] Note that by citing *Boutilier* as authority, Respts. equate Petitioner, a United States citizen, to Mr. Boutilier, an alien trying to return to the U.S.[9] In the *Boutilier* decision, the Court affirmed the complete discretion of Congress to establish "classifications and criteria for admission that would fail to pass constitutional muster if applied in a domestic context."[10] However, unlike the INS in the *Boutilier* decision, Lane and Mathews as representatives of LSU **are** "persons" subject to U.S. 42 § 1983 and are prohibited from depriving Wagner of rights, privileges, and immunities secured by the Constitution and Louisiana laws.

Respts. similarly err in relying on *Finley*.[11] In the *Finley* case, the NEA acted as a patron by exercising its prerogative to fund projects in a competitive bidding process to distribute limited resources. In contrast, graduate students subject to the seven-year limit are part of the University Community without which LSU would not be a research university. Those allowed to complete their studies are not recipients of a "gift." A graduate student who selflessly conducts research to benefit the University and advancement of knowledge with no expectation of any gain except the chance to earn a Ph.D. is not a recipient but is instead a patron.

Further, no scarce resource is being competitively distributed here. Instead, Respts. are squandering a scarce

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[7] *Brief in Opposition to Petition for a Writ of Certiorari*, Page 15.

[8] *Boutilier* at 128.

[9] When the affected person is neither a citizen of the United States nor under the jurisdiction of a political sub-entity of the United States the INS is not required to follow U.S. 42 § 1983.

[10] Anne Y. Lee, *The Unfettered Executive: Is There an Inherent Presidential Power to Exclude Aliens?* 39 Colum. J.L. & Soc. Probs. 223, 228 (2005).

[11] *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

resource, the student and her completed research.

Finally, dismissing students without an academic reason cuts off the very competition to excellence that is the hallmark of a graduate education. The NEA's mandate is to advance artistic excellence. In contrast, Respts.' seven year limit does not even reference academic excellence. "A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.'"[12]

In this case, Respts. used their vague and variable seven-year limit to eject Wagner, a graduate student in good standing, while retaining others who were similarly situated. Contrary to their assertion, Respts. were acting as sovereign in the worst sense of the word.[13] The only evidence Respts. give for their contention that they are not sovereign are the guidelines written by Dean Larkin.[14] However Larkin withheld these guidelines from Wagner until after discovery ended. Further, Larkin ignored his guidelines in the Norah Thurman case,[15] contradicting Respts.' contention that the guidelines in any way fetter the dean's discretion.

D. Wagner was Treated Arbitrarily.

Though Wagner was never given a substantive reason for her dismissal, Respts.' attorney creatively articulated

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[12] *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 326 U.S. App. D.C. 25 (D.C. Cir. 1997).

[13] A sovereign is "A person, body, or state vested with independent and supreme authority." Bryan Garner (Ed.) Black's Law Dictionary, p. 1401, West Group, 1999.

[14] Larkin deposition testimony, Page 33.

[15] *Thurman v. Board of Sup'rs of Louisiana State University and Agr. and Mechanical College*, 02-0599 (La. App. 1st Cir. 7/15/02), *writ denied*, 538 U.S. 925, 3/24/03. *writ denied*,--- S.Ct. ----, 2006 (U.S., 10/2/06). (Referenced letter is dated June 4, 1999 and is marked A-203, Plaintiff's Exhibit 18 and page 2 is marked A-204).

"reasons." Thus, Respts. Attorney asserts that Wagner was not treated arbitrarily because she

> made extremely poor progress during the allotted seven years, her own major professor felt she lacked "basic research and writing skills," the Chair of the department [Lane] felt that her performance in the program was "unsatisfactory" and "poor," she signed an agreement that was crystal clear and utterly unambiguous that her first extension of time was her final opportunity to obtain her degree, and she failed to complete the academic requirements for her degree even after *eight* years.[16]

The first point regarding "poor writing and research skills" is not taken from any sworn testimony but instead is taken out of context from the December 7, 1999 letter (which includes the non-renewal pledge), which Mathews wrote under Lane's order and which actually concludes that Wagner's writing and research improved. The statement is:

> I attribute Emily's slow progress through the program to two main factors, her lack of basic research and writing skills and her working full time during her entire period of graduate training. While Emily was slow to acquire these skills, the quality of her work on her General Exam persuaded her committee that she could possibly complete the Ph.D. within the extra time requested.[17]

In Mathews' sworn trial testimony, he denied that the reason for Wagner's dismissal related to her research skills.[18]

Next, Respts.' attorney claims that Lane "felt that her performance in the program was 'unsatisfactory' and 'poor.'" If feelings, **without more**, are competent evidence sufficient

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[16] Resp.'s *Brief in Opposition to Petition for Writ of Certiorari*, Page 17.

[17] Larkin Deposition, Exhibit 5.

[18] Trial Transcript, Page 634.

to justify dismissing a student, then no students are safe from arbitrary treatment. Actions solely on the basis of "feelings" are a hallmark of arbitrary action.

The "final" statement to which Respts.' attorney next refers from the Timeline is neither clear nor unambiguous, nor does it state that this would be Wagner's "final opportunity to obtain her degree." Respts.' attorney creatively added words to those in the Timeline to convey Respts.' intended meaning but that is not what the words say.

Finally, Respts.' attorney justifies Wagner's dismissal by stating that Petitioner had "failed to complete the academic requirements for her degree even after *eight* years." This same statement could be applied equally to each and every one of the 62 students identified as being allowed between 9 and 14 years to complete their degree requirements.

E. Respondent Lane's Egregious Conduct Was Unprofessional and Violated Wagner's Liberty Interest.

Respts.' argument that Lane was justified in expelling Wagner due to concerns about the Department's standing in the University is a perversion of the record. Lane's concerns about standing were that he was protecting Wagner's committee from being "embarrassed" about seeking an extension for Petitioner in 2001 because they had signed the 1999 pledge that they would not ask for another extension for Wagner.[19] Lane stated:

> **Lane:** I had an ethical and moral responsibility, as far as I was concerned, to show them [petitioner's committee members] what they did to protect them, to protect the department, to protect the integrity of the whole operation. But I still-- I would have had, no matter what, to give my opinion on that, and then it [2001 petition, Larkin Deposition, Exhibit 14] would

[19] Note that this was the same December 7, 1999 document (Larkin Deposition, Exhibit 5) that Lane required committee members to sign before he would allow the first petition to be forwarded to the Graduate School.

> have gone up [to the graduate school]. But that's sort of saying that, you know, the contract that had been signed [Larkin Deposition, Exhibit 5], the verbal agreements and everything, should all be ignored because people forgot. It doesn't make sense to me. . . . . I was protecting them [committee members], because they had signed one thing, they had made a contract, they had basicly pledged their word, and now they were doing something that contradicted that. I wanted them to be aware of that.
>
> **Question:** *So you are saying that you were protecting them [the committee] from something bad that would have happened as a result of them signing that?*
>
> **Lane:** I think they would have been embarrassed. Now whether you want to think that's bad or not, you have to make that decision.[20]

Lane's concern for his personal "standing" and his concern about the personal "standing" of committee members omits any concern for Wagner's "standing" or the University's "standing." Apparently Lane believes committee members' need to avoid embarrassment outweighs Wagner's academic career or her perfectly good research, which could have increased the Department's standing both in the graduate school and in relation to other universities. Since Lane voiced no academic concerns, perhaps Mathews is right, that this is just a game, "the only game in town." There is no balancing of interest in Lane's calculus.

The Ph.D. graduate student's primary consideration for spending long hours of reading and research and complying with any and all requirements is the promise of an opportunity to earn a Ph.D. The graduate student's "standing" is her **liberty interest** and is at the heart of a graduate education. Otherwise, graduate school would be a fool's errand. This is

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[20] Lane Deposition, Page 218-219.

especially true if she is at the mercy of tyrannical administrators who are traditionally empowered by the courts to arbitrarily expel her for any reason or no reason. "The courts have not yet decided the liberty or property interest question."[21] This results in harm to the student. Yet, the very act by graduate students of filing suits to question university decisions impact their liberty interest by "cast[ing] a cloud upon a student's name, especially in a graduate-degree program."[22]

In this case, because Louisiana Courts rubber-stamped Respts.' acts, Respts. can be confident in this dismissal even though they have neither considered academic standards, nor followed their own procedures. Until the Court recognizes graduate students' liberty interests, they are a "peculiar institution," truly at the mercy of their university's unfettered discretion.

The present case is analogous to the *McElroy* case in which the Court accepted the taking of a cafeteria worker's security clearance, and thus her job, based on the **opinion** that she failed to meet security requirements.[23] The Court speculated her loss of security clearance could have been related to her being careless with her identification badge.[24] In Justice Brennan's dissent, he stated, "She was excluded as a 'security risk,' that designation most odious in our times. The Court consoles itself with the speculation that she may have been merely garrulous, or careless with her identification badge, and indeed she might, although she will never find

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[21] Steven Milam & Rebecca Marshall, *Impact of Regents of University of Michigan v. Ewing on Academic Dismissals from Graduate and Professiona*l Schools, 13 J.C.& U.L. 335, 336 (1987).

[22] Dina Lallo, *Student Challenges to Grades and Academic Dismissals: Are They Losing Battles?*, 18 J.C. & U.L. 577, 593 (1991).

[23] *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 898, 81 S. Ct. 1743, 1750 (1961).

[24] *McElroy* at 899.

out."[25] Just as the McElroy Court accepted the Navy's conclusory statement about the cafeteria worker, so the Louisiana courts accepted Lane's conclusory remark about a graduate student. National Security is unharmed when courts look past their traditional prejudices, and courts thus have no need to "console" themselves with convenient fictions.

F. Wagner Correctly Interpreted the Handbook.

The nine-year limit in the Department's Handbook[26] is clearly stated and is not ambiguous. The same Respts. who tell us to ignore the Dean's role that is stated in the Graduate Catalog also tell us to ignore the department's role under their own nine-year limit. A nine-year limit means there must be a genuine academic reason to truncate the nine years. Respts. rely on an Alice in Wonderland mentality where words do not say what they mean but instead say what Respts. say they mean. Respts.' statement that nine years is the maximum time allowed is also contradicted by evidence that two Cognitive Psychology graduate students were each allowed ten years to complete the Ph.D.[27] Neither of these students would have finished if they had been discarded after eight years.

G. Respondents' Description of Lane's Conspiracy Bears a Strong Resemblance to an Unconstitutional Cognovit.

Respts. claim "Ms. Wagner was not forced to sign away any rights, nor did she waive notice of anything."[28] What Respts. are saying is that Wagner had no rights and therefore, she could not sign away any rights. Since she had no rights, she was not entitled to notice and therefore the fact that she received no notice was irrelevant.

The Timeline statement "**This** extension [not any other extension] of one year to complete all requirements for my

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[25] *McElroy* at 901.

[26] Lane deposition, Exhibit 23, Page 8.

[27] Larkin deposition, Exhibit 4.

[28] Resp.'s Brief in Opposition to Petition for Writ of Certiorari, Page 2.

degree, if granted to me by the graduate school, **is final"** is not equivalent to the attorney's statements: "She simply agreed that the first extension of time would be her last;"[29] that " if she failed to attain her degree within the one additional year, she would not be granted any further extensions of time;"[30] or that "her first extension of time was her final opportunity to obtain her degree."[31] Although these words in Respts.' brief and words in the December 7, 1999 petition convey Lane's intentions, these words are not included in the Timeline and Wagner did not read the December 7, 1999 petition until after her dismissal.

If we accept Respts.' repeated assertion that what Wagner signed meant what they intended it to mean and that she agreed, the events conform perfectly to the qualities inherent in a cognovit.[32] Thus, bargaining was unequal and she received no consideration for giving up her rights. She was forced, in advance, to give up the right to notice before she was expelled as well as any chance for a second extension.

CONCLUSIONS

Respts.' actions in expelling Wagner exceed the guidelines established in *Horowitz* and *Ewing* which require a legitimate academic basis and notice before a graduate student is dismissed. The Supreme Court should grant this writ to clarify the permissible parameters within which academicians can dismiss students and to give students assurance that arbitrary dismissals are unacceptable.

Respectfully submitted

Emily Wagner

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[29] *Opposition* at 21-22.

[30] *Opposition* at 2.

[31] Opposition at 17.

[32] *D. H. Overmyer Col. Inc. V Frick Co.*, 405 U.S. 174.

(4)

No. 06-379

IN THE

FILED
DEC 22 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

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EMILY ABEL WAGNER, *Petitioner*

versus

THE BOARD OF SUPERVISORS OF
LOUISIANA STATE UNIVERSITY
AGRICULTURAL AND MECHANICAL COLLEGE,
ROBERT MATHEWS, IRVING LANE, *Respondents*

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On Petition For a Writ of Certiorari
To The Court of Appeal of Louisiana,
First Circuit

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PETITION FOR REHEARING

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[1] *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985).

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04- 2216 (La. App. 1st Cir. 11/4/05). 3, 5, 7, 8

ARGUMENT

The Court should grant certiorari in this case to clarify for students and universities whether universities must establish a reasonable nexus between dismissal decisions and the academic basis for dismissal decisions and whether universities are obligated to inform the student of the school's dissatisfaction and reason(s) for the **academic** dissatisfaction. Graduate students should be entitled to these basic rights even under the Court's decisions in *Curators of University of Missouri v. Horowitz,*[1] and *Regents of University of Michigan v. Ewing,.*[2] However, because those decisions resulted from the universities "inviting" the Court to "assume" students have property rights, and Louisiana declines to issue such an invitation, this Court allows Louisiana to assume students have no rights.

This denial of certiorari exacerbates the student's subservient status, not only harming petitioner, but also visiting harm on already vulnerable graduate students from now until this Court sees fit to require academic dismissals be based on (1) legitimate academic reasons that are (2) communicated to the student. Until this court defines and clarifies the Court's standards for justifying an "academic" dismissal, a barrage of cases will test the Supreme Court's intended meaning in *Horowitz* and *Ewing* beyond poor hygiene and a low test score. Universities will push the envelope, just as Respondents did here. This uncertainty created and perpetuated by the Court is unfair to both students and universities.

I. Did the Court intend *Ewing* and *Horowitz* to foreclose opportunity for graduate students by explicitly depriving them of any property interest in their educations?

The Supreme Court assumed without deciding that

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[1] *Curators of University of Missouri v. Horowitz,* 435 U.S. 78 (1978).

[2] *Regents of University of Michigan v. Ewing,* 474 U.S. 214 (1985).

graduate students have a property right in their continued educations.[3] Since those decisions, courts have "noted the existence of a split among the circuits over the extent of due process protections for property rights after *Ewing*."[4] Most courts follow the Supreme court's lead by "assuming" students have a property right in their educations.[5] However, other courts interpret *Ewing* to definitively confer property rights on enrolled students. "The United States Supreme Court has held that a student who has been accepted to a university has an implied contractual right to continued enrollment in that university. . . This implied contractual right gives the student the right to continued enrollment free from arbitrary dismissal."[6] Similarly, in the case of *Gossett v. Oklahoma ex rel. Bd. Of Regents for Langston U.*, "As an initial matter, we note that Mr. Gossett had a property interest in his place in the Nursing School program that is entitled to due process protection under the Constitution."[7]

Although *Horowitz* is frequently cited to dispose of the question as to whether students have a property right to their education,

> *Horowitz* is not dispositive of the question of whether Hughes was deprived of a protected property interest. Contrary to the University's assertions, the Supreme Court in *Horowitz* did not reject the student's claim that she had been deprived of a protected property interest. First, the student did not claim a property interest in *Horowitz*. Second, the Supreme Court, in assuming the existence of the student's claimed liberty interest, also stated that it was assuming the existence

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[3] *Horowitz*, 435 U.S. 78 (1978). *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985).

[4] *Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553, 559, (La.,1988).

[5] *See Richmond v. Fowlkes*, 228 F. 3d 854, 859, (Arkansas 2000).

[6] *Carlton v. Trustees of University of Detroit Mercy*, 2002 WL 533885, Mich.App.,2002. Page 2

[7] 245 F.3d 1172, 1181 C.A.10 (Okla.2001).

> of a property interest. And finally, in addressing the student's substantive due process claim, the Court assumed that such an interest, if it even existed, would receive substantive due process protection under the Due Process Clause.[8]

In the present case, Louisiana's First Circuit concluded the U.S. Supreme Court decisions in *Ewing* and *Horowitz* means that graduate students have no property or liberty interest in their graduate education regardless of their time, money, and work invested into their programs or their academic merit. Louisiana's First Circuit stated:

> [T]he United States Supreme [C]ourt has considered whether the right to "continued" enrollment to university programs is a federally protected right under the due process clause of the Fourteenth Amendment and has refused to definitively recognize such a constitutionally protected property interest.[9]

However, contrary to the First Circuit's conclusion, this Court's **assumption** that a student **has** a property right is not the same as a declaration a student has **no property right**. The First Circuit's failure to follow the Supreme Court's lead and assume petitioner has a property right to her education allowed the First Circuit to give short shrift to petitioner's right to due process.

The varying interpretations given to the Supreme Court's valuation of a student's rights enables the First Circuit to obscure and excuse the conscience shocking deprivation petitioner suffered at the hands of Lane with acquiescence from Mathews and LSU. The Supreme Court should grant certiorari to clarify the nature of a graduate student's property right or interest in her education and the required conditions

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[8] *University of Mississippi Medical Center v. Hughes*, 765 So. 2d 528, 537 (2000).

[9] *Wagner v. Board of Sup'rs*, page 12.

precedent for her dismissal.

II. Do the Supreme Court's decisions give graduate schools license to arbitrarily dismiss students?

The Supreme Court indicated that students dismissed arbitrarily or because of capricious or malicious motives would be afforded some protection.[10] The court in *Ewing* described in detail the justification for their conclusion that Ewing's dismissal was not arbitrary. Indeed the *Axson-Flynn* court raised the court's obligation to review for arbitrariness to the status of a duty. "Although we do not second-guess the pedagogical wisdom or efficacy of an educator's goal, [Footnote omitted] we would be abdicating our judicial duty if we failed to investigate whether the educational goal or pedagogical concern was pretextual."[11] Similarly, in the *Gossett* case, "the notion of judicial deference to academic decisions loses force when, as here, the decision maker is 'accused of concealing nonacademic or constitutionally impermissible reasons' for its action."[12] In *Sylvester v. Texas Southern University*, Judge Hughes explained that

> "the constitution does not define the benefits that a state must furnish nor the process it may use other than to require that similarly situated people be treated similarly. Because in the exercise of its state authority, TSU has afforded a meaningful review to other students who protested their grades, TSU must provide that benefit to Sylvester. Governmental actions cannot be arbitrary. Having no basis for comparison is arbitrary. Changing the committee on the chairman's malicious whim is arbitrary.[13]

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[10] *Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 91-92 (1978). *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 224-225 (1985).

[11] *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1292-1293, (Utah 2004).

[12] *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston University* 245 F.3d 1172, 1181 C.A.10 (Okla.),2001.

[13] *Sylvester v. Texas Southern University*, 957 F. Supp. 944, 947 (1997).

Judge Hughes based his conclusion that Sylvester's professor exceeded the bounds of professional conduct by a detailed account of his arbitrariness.[14]

Though acknowledging Petitioner's allegation that Lane's decision to discard her was motivated by maliciousness, the First Circuit's decision ignores the issue of whether Lane's actions were malicious. Instead, the court simply asserted that "the record clearly supports the finding that the decision not to extend an additional year to plaintiff was careful and deliberate"[15] and "that the alleged arbitrary interference of which she complains was simply Dr. Lane's action in seeking to have the timeline agreement honored."[16] The First Circuit ignores the likelihood that the very existence of a "Timeline agreement," which applied only to Petitioner, could itself have been evidence of malicious intent. Further, the First Circuit makes no effort to detail the facts in the record that "clearly supports" Respondents' denial of an extension. "Clearly," there are no such facts, but only conclusory statements not based on facts. The First Circuit's superficial review ignored evidence for improper motives and unquestioningly "assumed" the validity of Lane's conclusion that petitioner is unworthy.

"Clearly," neither the First Circuit, nor respondents understand that academic dismissals must have an academic basis. The Supreme Court's deference to Universities is based on the assumption that universities operate in good faith and understand the difference between pretextual or arbitrary "reasons" and legitimate academic reasons. This assumption

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[14] Judge Hughes noted that "Bullock gave 'yes' as the full answer to part of question V, and he gave no answer for another section. No student could have received a perfect score for answering "yes" to an essay question on a law school final, yet that was the correct answer on Bullock's key." *Sylvester v. Texas* at 946.

[15] *Wagner v. Board of Sup'rs* at Page 11.

[16] *Wagner v. Board of Sup'rs* at Page 16.

is wasted on LSU. To protect graduate students from arbitrary dismissals, certiorari should be granted to clarify what the Court means by an "academic" basis for dismissal.

III. Were Lane's actions a "substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment"[17]?

The Court provides little guidance in defining "accepted academic norms," "careful and deliberate," or "professional judgment." Case law tends to be lenient toward universities in defining these terms so that whatever the "professional" does is deemed to be "professional."[18] However, some courts have had the courage to identify conduct that "exceeds professional norms" or does not show professional judgment. For example, the judge in the *Gutzwiller* case had no difficulty deciding "a decision to deny tenure on the basis of a candidate's sex is, as a matter of law, such a substantial departure from accepted academic norms as to demonstrate that Fenik and Cohen did not exercise professional judgment."[19] Judge Hughes in the case of *Sylvester v. Texas Southern University* was more courageous when he declared that Karen Sylvester "had a right to both procedural and substantive due process in contesting her grade; she received neither."[20] In the Leonard case, the court speculated that

> "the faculty may have been acting in bad faith or motivated by ill will when they implemented the changes to the advanced seminar. Likewise, while the final grade which Leonard received for this course may technically qualify as an "academic decision," a reasonable jury could conclude that this grade was not

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[17] *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985).

[18] *Schuler v. University of Minnesota*, 788 F.2d 510, 516, (Minn.),1986.

[19] *Gutzwiller v. Fenik*, 860 F.2d 1317, 1329 (1988).

[20] *Sylvester v. Texas Southern University*, 957 F. Supp. 944, 947 (1997).

> actually based on the professor's professional judgment but, instead, intended as a way to prevent Leonard from continuing in the Physical Therapy program. . . . a faculty should not be allowed to insulate a decision based on its apparent dislike for a student by cloaking it in the guise of an "academic decision."[21]

In the present case, neither Lane nor the University pretended their reason for dismissing petitioner was "academic." However, the First Circuit Court of Appeal built their own "straw man" and proceeded to knock it down to justify petitioner's expulsion. It is true that Lane's "decision not to extend an additional year to plaintiff was careful and deliberate"[22] but "careful and deliberate" can be applied to any malicious conspiracy. Are these the "careful and deliberate" procedures the Supreme Court intended universities to employ to determine which students would be sacrificed? The First Circuit's opinion goes on, "Clearly, the individual merit of each student's need for additional time governs whether such an extension is granted,"[23] but the court did not bother to explain why Petitioner's need for more time lacked "merit" while the 62 other students who each received as much time as they needed were "assumed" to have merit.

IV. How does the arbitrary categorization of graduate students as deserving or undeserving of more time advance a legitimate state interest sufficient to justify the harm done to those excluded?

Strict scrutiny is used by the Court to remedy the effects of discrimination on African Americans. This is

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[21] *Leonard v. University of Delaware*, 2000 WL 1456295 (Page 7) Not Reported in F.Supp.2d, D.Del.,2000.

[22] *Wagner v. Bd. of Sup'ervisors of Louisiana State University, Robert Mathews, Irving Lane*, 04- 2216 (La. App. 1st Cir. 11/4/05) Page 11.

[23] *Wagner v. Board of Sup'rs* at Page 14.

justified because from the Court's decisions in *Plessy v. Ferguson*[24] to the Court's decision in *Missouri Ex. Rel. Gaines v. Canada,*[25] this Court was responsible for creating and perpetuating underdog status for non-white citizens in all endeavors, including, for example, education,[26] recreation,[27] and transportation.[28] By relying on stare decisis and states' rights and ignoring the text of U.S. 42 § 1983 and the 14th Amendment this Court maintained underdog status for black people by ensuring (or assuming) that they had no remedy under law. In Louisiana, blacks "clearly" had no rights even though other states "assumed" blacks had rights.

Just as there never was a constitutional basis for "separate but equal," there is no constitutional basis for having different levels of scrutiny which allow states to violate all but the most "fundamental" individual rights. To single out some individual rights as less deserving simply leads to another underclass created and perpetuated by state action, different from state to state, and rubber stamped by this Supreme Court.

Here, the Louisiana First Circuit, Court of Appeal assumes students "clearly" have no rights in contrast to the majority of states which "assume" students have rights. Further, the First Circuit opines that "where no fundamental or express constitutional right or 'suspect' class, nor any other enumerated class such as birth, age, sex, culture or political affiliation is alleged as the basis for discrimination, the use of another classification is subject to the minimal or lowest level of scrutiny."[29]

The First Circuit goes on to "assume" respondents have a rational basis for the seven year limit (which was not

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[24] 163 U.S. 537, 544, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).

[25] 305 U.S. 337, 59 S.Ct. 232, 83 L. Ed. 208 (1938).

[26] *Lum v. Rice,* 275 U.S. 78, 48 S. Ct. 91, 72 L. Ed. 172 (1927).

[27] *Boyer v. Garrett,* 183 F. 2d 582 (1950).

[28] *Chiles v. Chesapeake and Ohio Railway Co.*, 218 U.S. 71, 30 S. Ct. 667, 54 L. Ed. 936 (1910).

[29] *Wagner v. Board of Sup'rs* at Page 12.

even an issue in the lawsuit) and concludes that the seven year limit does not violate the equal protection clause. However, the First Circuit makes no effort to explain or defend Respondents' categorization of graduate students, each needing additional time, into those granted more time (the lucky innies) and those denied more time (the unlucky outies). Since the record omits any standards or criteria for group membership, we can speculate, based on petitioner's personal experience, that the criteria for being an "unlucky outie" could be being out-spoken, employed, married, female, old, hard-working, conservative, and/or having children. To use LSU's reasoning, "clearly" these are valid reasons to discard a graduate student. The "lucky innies," allowed more time, probably all deserve additional time, but what quality sets the "unlucky outies" apart from the "lucky innies?"

The question the First Circuit failed to address was, "What is the rational basis for categorizing graduate students who have come to the end of their seven years into those allowed more time to complete their research and those denied additional time?" The Court should agree with Petitioner's position that Respondents' mechanism for granting or denying extensions even violates the rational basis test.

V. What impact will this court's denial of Certiorari have on the plight of graduate students?

This Court can reason, just as Louisiana's First Circuit did, that petitioner "clearly" deserved to be expelled. After all, the Court set the precedent for blaming the victim in the *McElroy* case by speculating the cafeteria worker who was denied her security clearance "might" have been careless with her identification badge. [30] The impact of the Court's decision to avoid the difficult task of clarifying students' rights by denying certiorari will extend beyond the harm to Petitioner. Just as Louisiana's First Circuit concluded the

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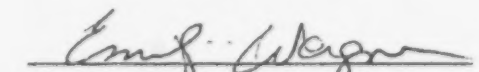
[30] *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy,* 367 U.S. 886, 898, 81 S. Ct. 1743, 1750 (1961).

Court's "assumption" that graduate students **have** property rights really means they have **no** property rights, Louisiana courts will assume that state universities do not need an academic reason or even a pretext to justify a student's dismissal. Universities do not even need to follow their own rules because they need only declare that **this** rule does not apply to **this** student in **this** situation, and courts will agree. Word will spread among universities that graduate students have no rights and can be arbitrarily expelled. This will allow graduate schools to make short shrift of graduate students' First Amendment rights because they will be allowed to discard annoying graduate students who question professors' research, who voice independent opinions, or who are not sycophants, under the radar, without even needing an academic pretext, because the courts will supply one.

CONCLUSION

Petitioner prays that this Court will reconsider its denial of certiorari. If these issues are not addressed, graduate students unfairly expelled will maintain their status as members of an underclass with no legal recourse. There is no merit in waiting fifty more years to recognize that graduate students who have earned liberty and property right to the opportunity to pursue their degree[31] and continue their research are entitled to due process before the right is taken.



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[31] *See Dixon v. Alabama State Board of Education*, 294 F.2d 150, 157 (5th Cir.-OLD 1961).